Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

David S. Forbes, *et al.*,

Petitioners,

v.

R. Alan Eagleson, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

In a RICO case, in order to obtain summary judgment on statute of limitations grounds, is a fraudulently concealing defendant required to show conclusively not only that a plaintiff's suspicion of wrongdoing should have been aroused but also, by undisputed evidence, that despite defendant's fraudulent concealment, the plaintiff could have uncovered the facts necessary to plead the pattern of racketeering?

LIST OF PARTIES

Petitioners are David S. Forbes, Richard D. Middleton, D. Bradford Park, Ulf Nilsson, and Douglas D. Smail

Respondents are R. Alan Eagleson; The National Hockey League; Philadelphia Flyers Limited Partnership; Boston Professional Hockey Association, Inc.; Niagara Frontier Hockey, L.P.; Calgary Flames Limited Partnership; Chicago Blackhawk Hockey Team, Inc.; Dallas Hockey Club, Inc.; Detroit Red Wings, Inc.; Edmonton Oilers Hockey Corp.; KTR Hockey Limited Partnership; LAK Acquisition Corp.; Le Club De Hockey Canadien, Inc.; Meadowlanders, Inc.; New York Islanders Hockey Club, L.P.; Rangers Hockey Club, A Division of Madison Square Garden Center, Inc.; Pittsburgh Hockey Associates; Comsat Entertainment Group, Inc.; a subsidiary of Comsat Corporation; St. Louis Blues Hockey Club, L.P.; San Jose Sharks Corp.; Maple Leaf Gardens, Limited; Vancouver Hockey Club, Ltd.; Washington Hockey Limited Partnership; Jets Hockey Ventures, (A Limited Partnership); John Ziegler; William W. Wirtz; RAE-CON Consultants, Ltd.; Sports Management, Ltd.; Eagleson, Ungerman, a law firm; Jialson Holdings, Ltd.; Colorado Avalanche LLC

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PETITION FOR A WRIT OF *CERTIORARI*

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) and *Rotella v. Wood*, 528 U.S. 549 (2000), this Court established that the four-year RICO statute of limitations begins running upon either the discovery or the occurrence of the plaintiff's injury. However, the Court made clear that the statute of limitations is tolled under traditional equitable tolling principles if the defendant is guilty of fraudulent concealment and if a "plaintiff shows that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." *Klehr,* 521 U.S. at 195 (quotation marks and internal citation omitted). In *Rotella*, 528 at 561, the Court elaborated that the statute may be tolled "where a pattern [of racketeering activity] remains obscure in the face of a plaintiff's diligence in seeking to identify it."

Left unresolved in *Klehr* and *Rotella*, however, is how to apply this equitable tolling doctrine in the context of a defendant's motion for summary judgment on a statute of limitations defense, a question on which the circuits are in fundamental conflict and which is squarely presented by this RICO case.

This petition presents the question: In determining whether a defendant moving for summary judgment has met its responsibilities under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), how should the district court allocate the burden to show absence of disputed facts as to whether a plaintiff could have discovered an "obscure pattern?"[1] Should it require the defen-

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[1]Plaintiffs are not referring to the "burden of proof" at trial which plaintiffs acknowledge remains theirs. Rather, the question here is how a summary judgment movant's *Celotex* burden is satisfied.

dant to show not only that a plaintiff's suspicion of wrongdoing should have been aroused but also, by undisputed facts, that despite defendant's fraudulent concealment, the plaintiff could have discerned the pattern? Or should the plaintiff, as the nonmovant, be required to demonstrate, indisputably, that the pattern, in fact, "remained obscure" and that no amount of diligence could have uncovered it?

In this case, plaintiffs submitted evidence supporting all the elements required to toll the statute under the standard set forth in *Klehr* and *Rotella.* In its opinion, the Third Circuit assumed both that defendants had engaged in fraudulent concealment and that plaintiffs had exercised due diligence to uncover the facts needed to support their claim. According to the court, all that remained was to determine whether plaintiffs did or could have uncovered the evidence they needed in time to file within the statutory period.

The Third Circuit made this determination by stating, generally, that the burden was on plaintiffs to prove that they did not have notice of their claims while remaining silent on the defendants' summary judgment burden. The court then upheld summary judgment for defendants on the basis of news articles which, at most, raised suspicions of wrongdoing. Defendants offered no evidence to show that a diligent plaintiff, acting on these suspicions, could have uncovered enough facts to plead the RICO claims within the statutory period. As a result, the court's ruling effectively drew all inferences for defendants, even though they were the moving party, thereby imposing the burden on the nonmovants to prove, conclusively, at summary judgment, that they could not have discovered the pattern of racketeering activity.

The Third Circuit's approach directly conflicts with the rule followed by the Eleventh Circuit, which, interpreting the principles established in *Celotex*, imposed the burden on the moving defendant to show not only the mere arousal of suspicion, but also to demonstrate conclusively that a plaintiff could have uncovered all facts needed to plead the claim. (See *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *cert. denied,* 529 U.S. 1130 (2000).) The Fifth, Seventh, and District of Columbia Circuits follow the same rule as the Eleventh.

In this petition, we ask the Court to resolve the conflict and urge that the rule enunciated by the Eleventh Circuit be affirmed by this Court. To leave the Third Circuit's rule in place will encourage the filing of premature and unsubstantiated RICO claims arising from innuendo generated in news articles, because plaintiffs will fear that not to do so will result in their claims being barred.

Granting this petition will enable this Court to clarify its *Rotella* holding that the statute of limitations may be tolled "where a pattern [of racketeering activity] remains obscure" and to clarify whether it intended *Klehr* to modify a summary judgment movant's burden under *Celotex*. Because courts are often asked to resolve claims of fraudulent concealment on summary judgment, particularly in RICO cases, it is important to the administration of justice for this Court to settle which party carries the burden on this issue at the summary judgment stage.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Forbes v. Eagleson*, 228 F.3d 471 (3d Cir. 2000), and appears in the Appendix at pages 2a-35a. The opinions of the United States District Court for the Eastern District of Pennsylvania granting summary judgment against plaintiffs are reported at *Forbes v. Eagleson,* 19 F.Supp.2d 352 (E.D. Pa. 1998) and 1999 WL 712571 (E.D. Pa. Sept 10, 1999) and appear in the Appendix at pages 36a-96a and 97a-108a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered judgment on October 17, 2000 and denied plaintiffs' timely petition for rehearing with suggestion of rehearing en banc on November 21, 2000. On February 7, 2001, this Court granted petitioners' application to extend the time to file this petition to and including April 20, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

15 U.S.C. § 15b provides in part:

Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued.

Fed R.. Civ. P. 56(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

Plaintiffs are five former hockey players who played for National Hockey League ("NHL") teams and who, like all NHL players, were members of the National Hockey League Players Association ("the union"). They filed this class action on November 7, 1995. In Count I (the only count at issue here), based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, plaintiffs allege they were victims of a conspiracy among the NHL, each NHL team, and the NHL's officers ("the owners") and the head of the players' union, R. Alan Eagleson.[2]

Plaintiffs allege that, for many years, the owners continuously bribed Eagleson and that, in exchange, Eagleson compromised the players' interests both during collective bargaining and in between contracts. As a result, the players were grossly underpaid and lost other important benefits. Plaintiffs allege that these bribes violated §302 of the Labor-Management Relations Act, 29 U.S.C. §186, and were RICO predicate acts.

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[2]In order to describe the legal rule adopted by the Third Circuit in this case, it is necessary to set forth in some detail the facts and allegations in the summary judgment record.

The bribes centered around a complex, hidden scheme involving international hockey tournaments which were not part of the regular season games. During the time Eagleson ran the union, he also served on the board of a Canadian quasi-governmental, not-for-profit corporation called Hockey Canada. Hockey Canada, in addition to overseeing and promoting amateur hockey in Canada, organized many international tournaments in which professional players participated. JA53-54, ¶29.[3]

Beginning in 1976, Eagleson and the owners agreed that the players would participate in the international tournaments as a joint venture between the owners and the players. Under the agreements, the tournaments' profits were to be divided between Hockey Canada, the owners, and the players. JA54, ¶31. Hockey Canada, as the tournaments' promoter, empowered Eagleson to manage the tournaments. JA404; JA416-17.

Over the course of more than 15 years, Eagleson used his position to secretly skim hundreds of thousands of dollars from the tournaments' revenues. The mechanisms Eagleson used were complex and well hidden from the players, involving shell corporations, phony invoices, padded expense reports, exaggerated reimbursements, and other devices. *See, e.g.*, JA415-42.

In March 1994, after a 3½-year investigation involving multiple federal law enforcement agencies with subpoena power, JA405, the U.S. government issued a 62-page indictment of Eagleson on RICO, mail fraud, and other charges, revealing Eagleson's criminal profiteering. JA296-359. The indictment included charges that Eagleson deliberately concealed the

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[3]"JA" citations are to the Joint Appendix in the Third Circuit. "a" citations are to the appendix attached to this petition.

schemes, lying to the players and sending out fraudulent mailings. JA302; JA319. Eagleson later pled guilty to criminal charges in both the United States and Canada and was sentenced to 18 months in prison and fined $1 million (cdn). JA177-181.

The indictment revealed *for the first time* that Eagleson had illicitly taken huge sums from the international tournament revenues, that a large portion of the funds taken actually belonged to the owners, and that the scheme existed for many years. The indictment named the players as victims, but not the owners. JA302.

The indictment, therefore, provided plaintiffs with information necessary to allege a RICO violation. It showed that the owners approved, or, at a minimum, acquiesced in Eagleson's conduct. This information, previously unknown to plaintiffs, was essential. Without the owners' participation in the scheme, any moneys going to Eagleson would not have been bribes, and therefore, would not have been RICO violations.

Plaintiffs' inability to uncover this scheme earlier was the direct result of Eagleson's and the owners' deliberate deception. Although Eagleson and the owners were fiduciaries to the players and so were required to disclose all financial matters concerning the international tournaments, they never did, even when specifically asked by the players and their representatives. Instead, they concealed the illegal arrangement.

Eagleson repeatedly told the players that he accepted no money from international hockey, JA72, ¶81, and he represented that the books of the union and the hockey tournaments were audited by independent accounting firms which found no wrongdoing, JA75-76, ¶¶95-99. The indictment exposed all of these statements as lies. Further, Eagleson, supported by NHL

officials, routinely reported to the players that their low level of earnings resulted from the claimed poor economics of professional hockey, JA82-83, ¶120, rather than from his crimes revealed in the indictment.

In November 1995, well within four years after the indictment, the players filed this action.[4] The players alleged in an amended complaint that the four year RICO statute of limitations had been tolled because defendants had fraudulently concealed the pattern of racketeering activity — the bribes — and that although plaintiffs had exercised due diligence, they were unable to uncover the facts needed to plead the bribe scheme until the release of Eagleson's indictment. JA69-83.

Defendants moved for summary judgment, arguing that the plaintiffs had all the information necessary to file suit more than four years earlier and therefore were barred by the statute of limitations. In support of their motion, defendants pointed only to four items: a July 1984 *Sports Illustrated* article, JA158-69; a June 1989 report to the players by Edward Garvey, one of plaintiffs' counsel, JA103-57; a June 1991 Alberta, Canada labour board petition filed by a Canadian sports agent, JA601-45; and a September 1991 newspaper series in the Lawrence,

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[4]At the time this action was filed, the Third Circuit followed the rule in *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125 (3d Cir. 1988), under which the four year period could be measured from the "last predicate act." Subsequently, this Court ruled invalid both the "last predicate act" rule and the Third Circuit's "injury plus pattern discovery" rule. See *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) and *Rotella v. Wood*, 528 U.S. 549 (2000). The Third Circuit in the instant case applied an "injury discovery" rule. 25a.

Massachusetts *Eagle-Tribune,* JA646-78. (The district court permitted plaintiffs no discovery.)

The *Sports Illustrated* article purported to be an expose of Eagleson's alleged conflicts of interest. Plaintiffs carefully analyzed the *Sports Illustrated* article in their briefs, demonstrating that it contained only superficial and unverifiable information giving rise, at most, to innuendo about the wrongdoing by Eagleson, wrongdoing which was not actually exposed until many years later in the indictment.

As a result of major gaps in the article's information, the possibility that the owners were bribing Eagleson was, at most, a conclusion supported by pure speculation. Thus, plaintiffs could not have pleaded the bribe scheme without filling in those gaps, and most importantly, without independently substantiating the hearsay and anonymous reports in a sports magazine.[5]

The *Sports Illustrated* article contained no explict assertion that Eagleson was being bribed by the owners. The strongest statement in the article consistent with such an allega-

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[5]Plaintiffs, of course, could not have filed a complaint which did not comply with Federal Rule of Civil Procedure 11. As the Fifth Circuit explained in *Chapman & Cole v. Itel Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir. 1989):

> Given the . . . proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses prior to bringing such suit or risk sanctions for failing to do so. (citation omitted)

tion was a passage mentioned in the Garvey report and cited by both the district court and the Third Circuit. 16a. The *Sports Illustrated* article quoted an *anonymous* team general manager as saying: "Al delivers us the players . . . and we give him international hockey." JA162. Defendants alleged that the implication of this statement was that the owners had acquiesced in Eagleson's managing the international tournaments in return for Eagleson's selling out the players at the bargaining table. Because the statement was anonymous, plaintiffs could not have filed suit without substantiating it.

In 1988, a group of players asked Garvey, a lawyer and former sports union leader, to investigate Eagleson's overall stewardship of the union. After many months and hundreds of hours of investigation by Garvey and others, Garvey issued his report in June 1989. JA103-57. He analyzed the players' collective bargaining agreements and concluded that they were woefully lacking in benefits in comparison to the achievements of the unions for baseball, basketball, and football players.

Garvey also reported that he had worked hard to obtain financial information about the union and Hockey Canada's tournaments, in part, to determine whether the allegations in the *Sports Illustrated* article could be substantiated. In this regard, Garvey's investigation completely failed. JA274-82; JA796-800. While Garvey told the players that the *Sports Illustrated* article raised serious questions, the undisputed evidence is that he was unable to obtain any of the financial records, JA122, or otherwise corroborate the *Sports Illustrated* allegations, stating in his report: "[t]he result of our investigation [into international hockey] is a big goose egg." JA118.

The other two items submitted by the defendants to support summary judgment added nothing. The Alberta labour

board petition (filed by a Canadian sports agent) alleged collusion between Eagleson and the owners but, as the district court acknowledged, it is uncontested that, by the petition's own statement, JA607, its *only* evidence was the *Sports Illustrated* article. 62a. Likewise, the *Eagle-Tribune* articles quoted from *Sports Illustrated* and produced no additional evidence that could be construed as bribes.

By contrast to the gaps in defendants' submissions, Eagleson's 1994 indictment revealed facts that were not in *Sports Illustrated* and not available to the public but that were essential to plaintiffs' being able to plead the RICO pattern, i.e, the bribes which violated §302. Most importantly, the indictment contained information from a reliable source — the allegations of the United States government following an extensive investigation by multiple federal agencies and a grand jury— as distinguished from the unreliable and unverifiable, and in part, anonymous sources in *Sports Illustrated.*

Because plaintiffs were denied all discovery, they submitted an offer of proof to establish that if subpoenaed, the lead FBI agent in the Eagleson criminal investigation would have testified that virtually all of the incriminating evidence concerning Eagleson's profiteering from international hockey tournaments was not available to the public and could not have been obtained without the government's vast investigatory resources, including the compulsory process of the grand jury. The FBI obtained one particularly crucial piece of information only through the revelations of an inside informant. JA712-14.[6]

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[6]The FBI would not permit the agent to voluntarily supply plaintiffs with an affidavit and would only permit him to testify under subpoena.

On this record, nevertheless, the district court held that the news articles and the Garvey report provided plaintiffs with "inquiry notice" no later than 1990 (four years *before* the indictment) and that this "notice" showed "the existence of their [RICO bribery] claim [by October, 1991] [the date of the *Eagle Tribune* articles] at the latest . . . ." 94a.

The Third Circuit affirmed. Without distinguishing between the plaintiffs' obligations in responding to a summary judgment motion and plaintiffs' trial burden, the Third Circuit held that "the plaintiff has the burden of proving fraudulent concealment," relying on *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1179 (3d Cir. 1993). 31a. The court assumed that plaintiffs had established that defendants were guilty of fraudulent concealment and that plaintiffs had exercised due diligence. 32a. The one remaining question was: " . . . whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim . . ." 31a.

The Third Circuit upheld summary judgment on defendants' evidence which showed only enough notice to arouse plaintiffs' suspicion; defendants produced no evidence that Garvey, or anyone else prior to the indictment, did or could have obtained information beyond the *Sports Illustrated* article to confirm those suspicions.

The pillar on which the court's decision rests is its statement:

> Comments in the Garvey report indicated that its author *suspected* that Eagleson was selling out the players in exchange for the ability to draw profits from international tournaments. (emphasis added)

15a. But while Garvey may have so suspected, the uncontroverted evidence made clear that he had not obtained pleadable information to back up any such suspicion, or at the very least, raised a genuine issue of material fact on this point.

Not only did his 1989 report state that his investigation produced a "big goose egg," but Garvey's affidavit in the district court stated, in part:

> *I never was able to corroborate any of the matters reported in the Sports Illustrated article* or find out whether Eagleson had, in fact, been paid moneys from the international tournaments. . . . I was never able to draw any conclusions about whether Eagleson had, in fact, received such benefits.

JA278, ¶18 (emphasis added). Defendants offered no evidence that Garvey could have uncovered information to verify the *Sports Illustrated* allegations. To Garvey, the players, and everyone else, prior to the indictment, the pattern (the bribes) "remained obscure."[7]

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[7]The Third Circuit noted that the Garvey report left no "doubt" that the poor collective bargaining contracts ("sweetheart agreements") obtained by Eagleson were "largely the result of a 'cozy' collective bargaining relationship between Eagleson" and the owners. 27a, 28a. But a "cozy" relationship and "sweetheart agreements" are not equivalent to a bribe. There are many other explanations for such phenomena. If RICO cases were required to be filed on *suspicions* of bribes based on "cozy" relationships, dissidents who regularly challenge union leaders as being too close to management could fill the courts with RICO claims.

In *Rotella v. Wood*, 528. U.S. 549 (2000), this Court assumed that a prospective plaintiff would be *suspicious* of the existence of a claim whose "pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it." 528 U.S. at 561. That is why the plaintiff is required to investigate; it is the *suspicion* that triggers the duty to "seek[] to identify" the pattern — but contrary to the Third Circuit's holding, suspicion does not trigger the running of the statute of limitations if the investigation does not turn up and could not have turned up the needed facts and, as a result, the "pattern remains obscure." If mere suspicion were sufficient, the analysis would end there, and the plaintiff's diligence and the obscurity of a claim would be irrelevant.

The unmistakable effect of the Third Circuit's approach was to draw all inferences to benefit the defendants and, as it said it did, to place the burden on plaintiffs, in response to defendants' motion, not just to offer evidence that could support a jury verdict, but to *prove,* indisputably, that they did not have enough knowledge to file suit before the statute of limitations would have otherwise expired. Because in *Celotex* this Court placed the responsibility on the movant to demonstrate the absence of contested material facts, this approach stands *Celotex* on its head, and is irreconcilable with the approach of other circuits.

REASON FOR GRANTING THE WRIT

Four circuits — the Fifth, Seventh, Eleventh, and District of Columbia — have explicitly set forth the rule that, on summary judgment, a moving defendant has the burden of demonstrating, by undisputed evidence, that a plaintiff had not merely suspicion, but also the facts needed to plead his claim,

despite the defendant's fraudulent concealment. This rule is directly contrary to the Third Circuit's approach in the instant case and, had it been applied here, it would have reversed the outcome.

Eleventh Circuit

In *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), a Clayton Act case, Florida dairies had conspired to rig bids for public school milk contracts and, beginning in the early 1970s, had divided up the market among themselves.[8] State and federal officials investigated the dairies, eventually charging them with antitrust violations, to which various defendants pled guilty. Major newspapers publicized the investigations and subsequent criminal charges. Five years after the newspaper accounts (of which plaintiffs were aware), plaintiffs — non-school milk purchasers — filed their Clayton Act claims against the dairies. *See id.* at 826-27.

The district court granted summary judgment, accepting defendants' argument that the appearance of the newspaper articles had started the running of the four-year statute of limitations, thus barring plaintiffs' claims. The Eleventh Circuit reversed.

The court made clear that plaintiffs would carry the burden *at trial* of proving that the defendants had concealed their illegal conduct and that the plaintiffs, "despite the exercise of due diligence on [their] part," failed to discover the necessary facts to plead their claim, but that, on summary judgment,

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[8]In *Rotella*, this Court reaffirmed the applicability of Clayton Act statute of limitations principles to RICO cases. *See* 528 U.S. at 557.

defendants had the burden to prove the opposite by "undisputed facts." 198 F.3d at 832.

The court cited to the holding in *Celotex* that the defendant, as the moving party,

> always bears the initial *responsibility* of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.

477 U.S. at 323 (emphasis added). The Eleventh Circuit applied this standard to impose on defendants "the initial *burden* of pointing out the undisputed facts which entitle it to judgment as a matter of law." 198 F.3d at 832. (emphasis added). The court then explained the application of this burden to a defendant seeking summary judgment when fraudulent concealment is alleged to have tolled the statute of limitations:

> In order to be entitled to judgment as a matter of law on these issues, then, *the Dairies have the burden, as the moving parties, to point to undisputed facts in the record which demonstrate conclusively that plaintiffs had notice of their claims*, and, that, had they exercised reasonable diligence, they would have discovered adequate grounds for filing this antitrust lawsuit during the limitations period. It is not enough for summary judgment to point to facts which *might* have caused a plaintiff to inquire, or *could* have led to evidence supporting his claim. A defendant who does this has succeeded in demonstrating only that there is a jury question regarding the

> tolling of the statute of limitations by fraudulent concealment. To award summary judgment on such a showing is error.

198 F.3d at 832-33 (first emphasis added) (citation omitted).

Despite the fact that the earlier newspaper stories had reported that actual criminal charges had been brought against defendants, the Eleventh Circuit held that the defendants "have shown only that there was information in 1988 that *might* have led plaintiffs to inquire, and have made virtually no showing at all regarding what plaintiffs would have discovered had they done so." 198 F.3d at 833. The Eleventh Circuit explained that, "even if it were undisputed that plaintiffs had notice [from newspaper stories of government prosecutions] regarding the *possibility* that Dairies *might be* fixing their prices, this does not mean that plaintiffs had either actual or constructive knowledge of their claim." *Id.* at 834 (emphasis added). This holding is in stark contrast to the effect placed by the Third Circuit on the much less complete and much less reliable information in the *Sports Illustrated* article.

Morton's Market thus stands in direct conflict with the Third Circuit's ruling here. On the controlling issue of whether plaintiffs had enough facts to plead a RICO claim founded on bribery of their union leader, defendants offered nothing beyond innuendo and hints contained in an isolated sports magazine article. Yet, the Third Circuit held that this showing was sufficient to entitle defendants to summary judgment.

Fifth Circuit

In *Texas v. Allan Construction Company*, 851 F.2d 1526 (5th Cir. 1988), relying on its earlier decision in *In re Beef*

Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), the Fifth Circuit followed the same rule as the Eleventh Circuit in *Morton's Market*:

> [I]n the summary judgment context it was up to defendants "as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit." To justify summary judgment, we concluded, *defendants would have had to prove that the plaintiffs had access to information* that would independently verify the allegations in [a similar lawsuit in another state].

851 F.2d at 1533 (citation omitted) (emphasis added).

Seventh Circuit

In *Law v. Medco Research, Inc.*, 113 F.3d 781 (7th Cir. 1997), the Seventh Circuit considered a summary judgment motion raising a statute of limitations defense to a securities fraud claim.[9] The plaintiffs had alleged that Medco had failed to disclose that it had been aware of deficiencies in processing an FDA application for one of its important products. Medco urged that articles in the trade press more than a year before suit was filed should have caused plaintiffs to be suspicious of the fraud and therefore, the statute of limitations began running when the articles appeared. The Seventh Circuit rejected this argument because a crucial fact needed to support plaintiffs' claim did not

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[9] In a subsequent case — *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332, 1338-39 (7th Cir. 1997) — the Seventh Circuit made it clear that the same analysis it applied in *Law* applied to statute of limitations defenses in RICO cases.

become available until disclosed in a related lawsuit initiated by Medco against Fujisawa, the parent of the company responsible for the FDA problem. The Medco-Fujisawa lawsuit had been filed long after the articles appeared and only three months before the plaintiffs filed their securities law claims.

The Seventh Circuit reversed a grant of summary judgment in favor of Medco. Then Chief Judge Posner explained:

> Suspicious circumstances, coupled with ease of discovering, *without the use of legal process*, whether the suspicion is well grounded, may cause the statute of limitations to start to run before the plaintiffs discover the actual fraud. *The defendants in our case have not explained* what investors could have done before Medco sued Fujisawa in May of 1993, less than three months before this suit was filed, to obtain the necessary facts.
>
> . . . .
>
> [T]oo much emphasis on the statute of limitations can precipitate premature and groundless suits, as plaintiffs rush to beat the deadline without being able to obtain good evidence of fraud; . . .

113 F.3d at 786 (citation omitted) (emphasis added).

In *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), a RICO case, Chief Judge Posner explained the concept of "inquiry notice":

> Inquiry notice . . . must not be construed so broadly that the statute of limitations starts running too soon for the victim of the fraud to be able to bring suit

> within a year. The facts constituting such notice must be sufficiently probative of fraud — sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated — not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit.

115 F.3d at 1335.

Thus, the Seventh Circuit defines inquiry notice which starts the statute of limitations running as the type of notice which not only arouses suspicion but also "enable[s]" the plaintiff to obtain the remaining needed facts through investigation. In direct contrast, the Third Circuit's approach, here, effectively defined inquiry notice as the mere arousal of suspicion from the *Sports Illustrated* article without any showing by defendants that the article "enabled plaintiffs to tie up loose ends" of uncovering the needed facts from their subsequent investigation (a point which, in any event, was contested by Garvey's affidavit and the FBI agent's offer of proof).[10]

---

[10]One of the reasons that suspicion is not enough is that mere suspicion will not permit a plaintiff to file a complaint in compliance with Rule 11. Here, not only did Garvey never have more than a suspicion of bribery until the indictment was returned, but his suspicions were based only on an isolated report in a sports magazine. Since Garvey's own report stated that his efforts to verify the *Sports Illustrated* allegations had produced only "a big goose egg," he could not have filed a RICO case without directly flaunting Rule 11. *See Fujisawa,* 115 F.3d at 1335 and *Allan Construction Co.,* 851 F.2d at 1533.

District of Columbia Circuit

The District of Columbia Circuit has also placed on a defendant seeking summary judgment on statute of limitations grounds the burden of showing that the plaintiff had knowledge of the necessary facts. In *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989), a RICO case, the court applied *Celotex* to reverse a summary judgment for defendants, stating:

> [A] defendant who has engaged in fraudulent concealment, in order to make out a defense based on the plaintiff's lack of due diligence, must show something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment. . . . [T]he concealing defendant lacks the equity to command easier access to the defense, especially in view of the inherent evidentiary difficulty of determining whether particular but isolated facts should have put the plaintiff on inquiry notice of his claim.

The court made clear that, to obtain summary judgment, defendants would be required to show that plaintiffs had more than "hints, suspicions, hunches or rumors" before being required to file suit, 866 F.2d at 1494 (quotation marks and internal citation omitted).

* * * *

The approach of the Fifth, Seventh, Eleventh, and D.C. Circuits is fundamentally at odds with that of the Third Circuit. As a result, the outcome in this case would unquestionably have

been different had the rule in those circuits been followed. The instant defendants wholly failed to meet the burden those circuits would have imposed on them because they produced no evidence that, prior to Eagleson's indictment, plaintiffs could have uncovered the facts needed to plead that Eagleson had been bribed by the owners. And plaintiffs submitted evidence, including the FBI agent's offer of proof, to show that without the tools of compulsory process, plaintiffs could not otherwise have obtained the information.

Thus, there is a sharp conflict between the Third Circuit's application of *Celotex* to the *Rotella* standard on summary judgment and the approach of four other circuits under the same circumstances, as exemplified by the Eleventh Circuit's decision in *Morton's Market*. According to the Third Circuit, a defendant can obtain summary judgment under *Celotex* by offering no more than a press report raising a mere suspicion of racketeering activity. The Third Circuit effectively held that such a showing was sufficient to render a pattern of racketeering not "obscure" under this Court's *Rotella* decision.

By contrast, the Eleventh Circuit (along with the Fifth, Seventh, and District of Columbia Circuits) makes clear that a defendant making only such a limited showing fails, under *Celotex*, to meet its burden entitling it to summary judgment.

Under the Third Circuit's rule, plaintiffs can — indeed, must — file lawsuits at a mere hint of wrongdoing to avoid the bar of the statute of limitations, even where fraudulent concealment has thwarted plaintiffs' efforts to confirm "evidence" as flimsy as the unsubstantiated speculations of a sports columnist. The court's mistaken approach would open the floodgates to accusations and unnecessary litigation that could well be

unfounded and yet be enormously costly to defendants, as well as the court system.

Conclusion

This Court should grant this petition for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: April 20, 2001

No. _____

In The

Supreme Court of the United States

David S. Forbes, *et al.*,

Petitioners,

v.

R. Alan Eagleson, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

---

APPENDIX TO PETITION FOR A WRIT OF *CERTIORARI*

United States Court of Appeals,
Third Circuit

David S. FORBES; Richard D. Middleton; D. Bradford Park; Ulf Nilsson; Douglas D. Smail, suing individually and on behalf of a class of similarly situated individuals, to wit, all persons employed as professional hockey players by any of the defendant professional hockey teams during the time period in which defendant R. Alan Eagleson served as Executive Director of the National Hockey League Players Association,

v.

R. Alan EAGLESON; The National Hockey League; Philadelphia Flyers Limited Partnership; Boston Professional Hockey Association, Inc.; Niagara Frontier Hockey, L.P.; Calgary Flames Limited Partnership; Chicago Blackhawk HockeyTeam, Inc.; Dallas Hockey Club, Inc.; Detroit Red Wings, Inc.; Edmonton Oilers Hockey Corp.; KTR Hockey Limited Partnership; LAK Acquisition Corp.; Le Club De Hockey Canadien, Inc.; Meadowlanders, Inc.; New York Islanders Hockey Club, L.P.; Rangers Hockey Club, A Division of Madison Square Garden Center, Inc.; Pittsburgh Hockey Associates; Comsat Entertainment Group, Inc.; a subsidiary of Comsat Corporation; St. Louis Blues Hockey Club, L.P.; San Jose Sharks Corp.; Maple Leaf Gardens, Limited; Vancouver Hockey Club, Ltd.; Washington Hockey Limited Partnership; Jets Hockey Ventures, (A Limited Partnership); John Ziegler; William W. Wirtz; Samuel Simpson; Arthur Harnett; Marvin Goldblatt; Irving Ungerman; Howard Ungerman; Arthur Harnett Enterprises, Ltd.; Harcom Consultants, Ltd.; Harcom Stadium Advertising; All Canada Sports Promotions, Ltd.; RAE-CON Consultants, Ltd.; Sports Management, Ltd.; Eagleton, Ungerman, a law firm; Jialson Holdings, Ltd.; Colorado

Avalanche LLC

No. 99-1803.
Argued Sept. 12, 2000.
Filed Oct. 17, 2000.

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Michael A. Cardozo (argued), Steven C. Krane, Tandy M. O'Donoghue, Proskauer, Rose L.L.P., New York, NY, Bennett G. Picker, Ellen, Rosen, Rogoff, Stradley, Ronon, Stevens & Young, L.L.P., Philadelphia, PA, Shepard Goldfein, Skadden, Arps, Slate, Meagher & Flom, L.L.P., New York, NY, Attorneys for Appellees, The National Hockey League; Philadelphia *474 Flyers Limited Partnership; Boston Professional Hockey Association, Inc.; Niagara Frontier Hockey, L.P.; Calgary Flames Limited Partnership; Chicago Blackhawk Hockey Team, Inc.; Dallas Hockey Club, Inc.; Detroit Red Wings, Inc.; Edmonton Oilers Hockey Corp.; KTR Hockey Limited Partnership; LAK Acquisition Corp.; Le Club De Hockey Canadien, Inc.; Meadowlanders, Inc.; New York Islanders Hockey Club, L.P.; Rangers Hockey Club, a division of Madison Square Garden Center, Inc.; Pittsburgh Hockey Associates; Comsat Entertainment Group, Inc., a subsidiary of Comsat Corporation; St. Louis Blues Hockey Club, L.P.; San Jose Sharks Corp.; Maple Leaf Gardens, Limited; Vancouver Hockey Club, Ltd.; Washington Hockey Limited Partnership; Jets Hockey Ventures, (A limited partnership); John Ziegler, William W. Wirtz; Colorado Avalanche L.L.C.

R. Alan Eagleson, Clarkburg, Canada, Attorney pro se.

BEFORE: NYGAARD, ROTH, and GREENBERG, Circuit Judges.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. BACKGROUND

Five former National Hockey League ("NHL") players, David S. Forbes, Richard D. Middleton, D. Bradford Park, Ulf Nilsson, and Douglas D. Smail, have brought this RICO class action on behalf of all individuals who played NHL professional hockey during the time in which defendant R. Alan Eagleson served as executive director of the National Hockey League Players' Association ("NHLPA"). The complaint, as amended, alleges that Eagleson committed a variety of wrongful acts during his two-plus decades as head of the NHLPA which led to his criminal prosecution and conviction based on his pleas of guilty in both the United States and Canada. Count I of the complaint alleges that the NHL, its member teams, its president, John Ziegler, and the chairman of its board of governors, William Wirtz (collectively, the "NHL defendants"), conspired to bribe Eagleson to sell out the players' interests in collective bargaining. Count II of the complaint alleges that Eagleson and certain companies with which he was affiliated conspired to pilfer NHLPA funds over the course of many years. The principal issue on this appeal is whether the district court correctly granted Eagleson and the NHL defendants summary judgment on Count I on statute of limitations grounds. While Count II remains pending before the district court, and thus is not at issue on appeal, we nevertheless have jurisdiction under 28

U.S.C. § 1291, as the district court properly certified its summary judgment as final on Count I pursuant to Fed.R.Civ.P. 54(b).

The district court set forth the relevant background relating to Count I in its published opinion:

> Defendant R. Alan Eagleson was executive director of the NHLPA, the exclusive bargaining unit of NHL players, from the union's inception in 1967 until the end of 1991. Essentially singlehandedly, he operated the union's daily business and conducted the players' collective bargaining negotiations with the NHL. He also engaged in business for himself as an agent and lawyer representing players and even management personnel in their individual contract negotiations with club owners.
>
> Plaintiffs allege that from 1976 through 1991 the NHL defendants gave Eagleson unsupervised control of a joint NHL-NHLPA venture which participated in international hockey tournaments. They also granted permission for NHL players to participate in the extra-NHL events, which would otherwise have been prohibited by the players' contracts. The participation of the best NHL players was essential to the success of the tournaments.
>
> As head of the joint venture and as chief negotiator for the International Committee of Hockey Canada, a non-profit organization which negotiated international hockey events for Canada, Eagleson organized some two dozen or more tournaments from 1976 to 1991, including five Canada Cups and nearly annual World Championships and Soviet Union team exhibition tours. For each Canada Cup, Hockey Canada was to be paid the first $600,000 of net tournament proceeds after expenses and 15% of net revenues above

$2 million. All other net revenues were to be split equally between the NHL clubs and the NHLPA. The NHL players earned little additional pay for playing in the tournaments and were induced to participate on the understanding that they would be benefitting their pension fund. In fact, plaintiffs allege, with Eagleson's assent the NHL defendants simply reduced their contributions to the pension fund by however much the players contributed through international hockey.

Eagleson allegedly used his control over international hockey to enrich himself and his associates. He (1) directed revenue from sales of television and rinkboard advertising rights to himself and associates; (2) appropriated air travel passes obtained from Air Canada in exchange for advertising rights for his personal use and that of family and associates; (3) charged excessive rents for office space; and (4) obtained excessive reimbursement for the legal services of his law firm and for the services and expenses of employees of other of his private businesses who were 'lent' to the international hockey venture to coordinate the tournaments. Many of these schemes reduced the net proceeds to be divided between the NHLPA and the NHL pursuant to their joint venture.

In addition, from 1977 to 1986 the NHL defendants gave Eagleson the power to place the NHL's disability insurance policies for the players. (He also controlled the NHLPA's insurance funds.) Eagleson allegedly used his control over the disability insurance funds to extort personal benefits from insurance brokers and sham legal fees from players seeking disability benefits.

The crux of plaintiffs' claim against the NHL defendants is that they knew that Eagleson was using his control of international hockey and NHL disability

insurance funds to enrich himself, but nonetheless allowed him to continue to exercise these powers unconstrained. This acquiescence, plaintiffs allege, amounted to a pattern of violations of § 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186. Violations of § 302 constitute predicate acts of racketeering under [RICO] 18 U.S.C. § 1961(1)(C) (defining as a 'racketeering activity' any act indictable under 29 U.S.C. § 186).

Section 302 prohibits employers, employer associations, and their agents from paying money or any other 'thing of value' to employee representatives, and prohibits employee representatives from accepting any such payment. 29 U.S.C. § 186(a), (b). Plaintiffs allege that the NHL defendants violated § 302(a) each time they permitted NHL players to participate in an international tournament, gave Eagleson unsupervised control over a tournament and its revenues, failed to hold Eagleson accountable for the revenues and/or overlooked his financial improprieties, and allowed him control over placement of the NHL's disability insurance premiums. Concomitantly, Eagleson allegedly violated § 302(b) every time he accepted control of an international tournament or the purchase of disability insurance. Count I also alleges that Eagleson committed predicate acts of mail fraud and obstruction of justice in violation of 18 U.S.C. §§ 1341, 1346, and 1512(b) in attempting to conceal his wrongdoing. See 18 U.S.C. § 1961(1). In addition, plaintiffs contend that Eagleson's predicate acts can be imputed to the NHL defendants and vice versa because they were co-conspirators.

In return for the NHL defendants' facilitation of and acquiescence in his self-enriching schemes, Eagleson allegedly betrayed the interests of the players

> in collective bargaining. Without attempting to gain concessions in return or marshal the players' collective leverage, he agreed to the 1979 merger of the NHL and World Hockey Association (WHA) [which allegedly caused player salaries to drop by eliminating competition from the WHA], lack of free agency, supplemental drafts, equalization rules, and non-disclosure of players' salaries; he acquiesced in the removal of player representatives from the board of the players' pension funds and in the owners' practice of offsetting pension contributions by the amount the players contributed via international hockey; and he agreed to inadequate minimum salaries. As a result, the players' compensation was substantially suppressed from what it would have been had they been represented by an un-compromised and aggressive union negotiator. Eagleson negotiated collective bargains between the NHL and the NHLPA signed in 1976, 1981, 1984, and 1988. The last Eagleson-negotiated collective bargain expired in September 1991 and Eagleson's employment with the NHLPA terminated in December 1991.

Forbes v. Eagleson, 19 F.Supp.2d 352, 359-60 (E.D.Pa.1998) (footnotes and citations omitted except that footnote 10 is in the quoted text).

Plaintiffs filed this action on November 7, 1995, and later amended their complaint several times. Eagleson and the NHL defendants moved to dismiss, or, in the alternative, for a summary judgment on the ground that the four-year statute of limitations applicable to civil RICO claims barred Count I of the fourth amended complaint. The district court treated the motion as being for summary judgment and granted the motion in an opinion and order dated August 27, 1998. The court held that plaintiffs' claim with respect to injuries incurred before

November 7, 1991 (four years prior to the filing of the action) was time-barred, and further held that plaintiffs failed to state a claim with respect to alleged "new and independent" injuries incurred on or after November 7, 1991. See id. at 378.

Relying on our then extant case law, the district court held that a civil RICO cause of action accrues for limitations purposes when a plaintiff "knew or should have known that the elements of a civil RICO cause of action existed." Id. at 357 (citation and internal quotation marks omitted). In the court's words, "plaintiffs' claims accrued and the statute of limitations began to run when they discovered or should have discovered that defendants had possibly engaged in conduct constituting the alleged pattern of racketeering and that this conduct had possibly caused them injury." Id. Within this formulation plaintiffs argued that they did not possess sufficient verifiable information to plead their Count I claim until 1994 when a federal grand jury indicted Eagleson for racketeering, embezzlement from a labor union, receipt of kickbacks affecting an employee welfare benefit plan, mail fraud, and obstruction of justice. Id. at 361. Defendants, by contrast, argued that plaintiffs had or should have had sufficient knowledge of the circumstances asserted in their Count I claim to bring this action by September 1991 at the latest, based on four sets of documents: (1) a 1984 Sports Illustrated article discussing allegations of wrongdoing by Eagleson; (2) a 1989 report on Eagleson's leadership of the union drafted by an attorney, Edward R. Garvey, on behalf of a large number of NHL players; (3) a June 1991 complaint brought by two NHL players before the Alberta Labour Relations Board alleging collusion between Eagleson and the owners during collective bargaining; and (4) a series of investigative articles about Eagleson published by The Eagle Tribune of Lawrence, Massachusetts, in September 1991. Id. at 360-61. The district court, agreed with defendants, indicating as follows:

Even the most cursory of perusals of any one of these

... publications would have revealed to plaintiffs the gist of their claim: Eagleson was enriching himself by means of international hockey and the disability insurance and the NHL defendants knew so but apparently took no action to remove those opportunities from him. Moreover, examination of either the Sports Illustrated or The Eagle-Tribune article[s] would have revealed almost every detail of the schemes plaintiffs now allege in their complaint, as well as sources to whom they could have gone for verification or further information. From them, plaintiffs learned or should have learned the following facts (as discussed below, plaintiffs contest in any significant way only their notice of the third fact listed below):

1. Eagleson controlled international hockey on behalf of the NHL-NHLPA joint venture and Hockey Canada. He controlled the organization, administration, expenses, and revenues of the tournaments.

2. Eagleson was indisputably benefitting him self and his associates from international hockey. For example, Eagleson admitted that he lent his employees to international hockey at higher rates than he paid them and pocketed the difference, and that he gave control of the sale of advertising rights to businesses headed by his close associate and client, Arthur Harnett.

3. Eagleson was possibly benefitting himself and his associates from international hockey in other ways he did not admit. For example, he might have controlled the Harnett companies to whom he gave tournament advertising rights and directly benefitted from their sales, and he might have subsidized his private businesses' office expenses by charging excessive amounts to international hockey just as he subsidized the salaries of his employees.

4. Eagleson's control over international hockey and its

finances was not possible without the assent of the NHL defendants, who agreed to permit their players to play in the tournaments and agreed to Eagleson's leadership of the NHL-NHLPA partnership.

5. The NHL defendants knew or should have known, if only from the same public allegations of which plaintiffs were aware, of charges that Eagleson's control over international hockey was a conflict of interest and, more specifically, that Eagleson was enriching himself and his associates by means of international hockey. They nonetheless continued to permit their players to play in the tournaments and to allow Eagleson to run them without making any apparent move to police or otherwise constrain Eagleson's conduct.

6. Eagleson may have extorted personal benefits from brokers for placing disability insurance with them and may have charged players illegitimate fees for helping them get paid off on their union and NHL policies.

7. The NHL and Member Clubs allowed Eagleson to place their insurance funds despite notice of charges that he had leveraged this power for his personal benefit.

These facts were more than sufficient to provide plaintiffs with notice that the NHL defendants might be turning a blind eye to Eagleson's use of international hockey and NHL disability insurance funds to enrich himself, and thus with notice of a claim that both the NHL defendants and Eagleson were continuously violating § 302 of LMRA. Indeed, on the basis of these facts plaintiffs could have actually [pled] almost every allegation in their complaint concerning defendants' alleged § 302 violations. That they may not have recognized that these facts added up to unlawful bribes is irrelevant.

Plaintiffs also knew or should have known of

> their alleged injuries. Each of the inadequacies in the Eagleson-negotiated collective bargaining agreements alleged in plaintiffs' complaint ... [was] detailed in the Garvey report and most were also discussed in the Sports Illustrated and The Eagle-Tribune articles. Plaintiffs cannot seriously argue that players were unaware of their injuries as alleged in this action.
>
> . . . . .
>
> To summarize, I find (1) it is undisputed and indisputable that plaintiffs had inquiry notice of their claim by 1990 at the latest; (2) in the exercise of reasonable diligence plaintiffs should at the very least have inquired into the specific factual allegations in the Garvey and Sports Illustrated reports; (3) these reports, as well as The Eagle-Tribune articles ... provided notice to plaintiffs by October 1991 at the latest of more than sufficient facts to show the existence of their claim that the NHL defendants and Eagleson had engaged in a pattern of § 302 violations resulting in inadequate representation and bad deals for the players; and (4) no reasonable jury could find that plaintiffs were mislead as to their cause of action so as to toll the statute of limitations. Accordingly, I conclude that plaintiffs' claims [as] to injuries incurred prior to November 7, 1991 are barred as untimely.

Id. at 370-72, 377 (footnotes and citations omitted).

Following entry of the August 27, 1998 order, the district court granted plaintiffs leave to file a fifth amended complaint to plead a valid claim for new and independent injuries incurred after November 7, 1991. See Forbes v. Eagleson, No. CIV. A. 95-7021, 1999 WL 712571, at *1 (E.D.Pa. Sept.10, 1999). After defendants moved for dismissal or summary judgment with respect to Count I of the fifth amended complaint, the district court granted summary judgment in their favor on September 10,

1999. See id. at *5. The district court then on October 14, 1999, entered its Rule 54(b) order following which plaintiffs appealed.

The questions presented on this appeal are (1) as we have indicated, whether the district court erred in holding that plaintiffs' Count I claim for injuries incurred prior to November 7, 1991, is time-barred, and (2) whether the district court erred in dismissing the Count I claim in the fifth amended complaint for injuries incurred after November 7, 1991. We, however, will not address the district court's order granting summary judgment on the claim for injuries incurred after November 7, 1991, as we are satisfied that the court reached the correct result on that disposition, including its limitation on discovery, and that an opinion on the point would not have precedential value. Thus, we focus on the first question which requires us to determine when plaintiffs were on actual or constructive knowledge of their Count I claim. To that end, we review the four sets of documents upon which the district court relied in making its ruling on the timeliness issue as they are no less important to our result than they were to the result the district court reached.

The 1984 Sports Illustrated article

The July 1984 Sports Illustrated article made the following principal assertions regarding the conduct of Eagleson, the NHL and the NHLPA:

1. In his capacity as executive director of the NHLPA, Eagleson abused his positions as chief negotiator for Hockey Canada and as personal representative of many NHL players for his own gain and for the benefit of his friends.

2. Eagleson had numerous conflicts of interest in his capacities as executive director of the NHLPA, chief negotiator for Hockey Canada, and player representative.

3. Eagleson engaged in acts of self-dealing and assessed improper fees in connection with his administration of international hockey and player disability funds.

4. Eagleson may have failed properly to represent NHL players in collective bargaining between the NHL and the NHLPA as a result of his conflicts of interest.

5. Eagleson improperly diverted international hockey funds to his private businesses and may have used such funds improperly to cover his private business expenses. [FN1]

FN1.The district court described and quoted the Sports Illustrated article at great length. See Forbes, 19 F.Supp.2d at 361-62.

The 1989 Garvey report

The district court described the Garvey report and the events which precipitated it as follows:

Beginning in late 1988, plaintiffs allege, agents of some hockey players began seeking information about the finances of international hockey tournaments. In November 1988, they 'issued a "Position Paper" to the public in which, inter alia, they questioned Eagleson's conflicts as union leader and player agent as well as his role in international hockey,' contended that it was his fiduciary duty to disclose information on the tournaments' finances, and asserted that '[a]udited information should have been prepared regarding all monies received by Mr. Eagleson directly, or indirectly, in relation to his efforts in organizing the international hockey events.' About the same time, Ed Garvey, one

> of plaintiffs' counsel in this action, began an investigation of Eagleson and the union's affairs at the request of a 'substantial number of members of the plaintiff class.' Garvey and other investigators unsuccessfully sought financial information about international hockey and the union from Eagleson, the union, the NHL, Hockey Canada, and the Canadian government.
> Forbes, 19 F.Supp.2d at 363.

The Garvey report made numerous allegations regarding Eagleson. In addition to citing the 1984 Sports Illustrated article and recommending it for reading to all players, the Garvey Report cited instances of self-dealing and improper player representation against Eagleson. Moreover, it noted inadequacies in collective bargaining agreements and multiple bargaining concessions affecting NHL players attributable to Eagleson's compromised position. The report also criticized Eagleson for withholding information regarding international hockey, the NHL, the players' union and the pension fund, including information required to be disclosed by law.

Comments in the Garvey report indicated that its author suspected that Eagleson was selling out the players in exchange for the ability to draw profits from international tournaments. The report stated that "[t]he conflicts of interest [involving Eagleson] are shocking, but even more shocking is a pattern of sweetheart agreements with the NHL over all these years. It may sound harsh, but he has not pursued player interests at critical times in your history as a union." App. at 109. The report stated as follows with regard to Eagleson's financial take from international hockey:

> The $25,000 Alan [Eagleson] received from the NHLPA [as a bonus for organizing international tournaments] may be the tip of the iceberg. We have

asked Hockey Canada to tell us how much money goes to Alan, his law firm, holding companies he controls, family members or other legal entities. The result of our investigation is a big goose egg. The Hockey Canada spokesman, Ron Robinson told me: 'We cannot tell you how much money went to Eagleson without Alan's permission, but he has the information if he wants to share it with you....'

. . . . .

And, the man with the information, Alan Eagleson, won't give us an answer. While he has always maintained that he 'doesn't take a dime from international hockey', former employees dispute that and now he admits that Hockey Canada pays some 'overhead'. How much overhead? He won't say. Does he get money from promoting Intl. [sic] Hockey; from rink-board advertising as one player assured us he does?

App. at 118-19 (emphasis added). The report further stated:

[Eagleson] is a different person when he negotiates for you against his friends Wirtz and Ziegler [as compared to when he negotiates his own contract with the NHLPA]. Our tiger becomes a pussycat. No research, no preparations, no surprise attacks, no strike threats, no goals. As one G.M. put it [as quoted in the Sports Illustrated article]: 'Al delivers us the players and we give him international hockey. It's that simple.' A quid pro quo. It is no wonder the League put him in the Hockey Hall of Fame....

. . . . .

... Harold Ballard called the 1982 collective bargaining agreement 'a joke on the players'. Alan [Eagleson] wants to head international hockey. He can only do so if the NHL owners and Ziegler agree. Therefore, he must not do things at the bargaining table

> to antagonize them too much or they will dump him-simple as that. Again, Trottier's agent commented on Alan's conflict: 'They can take international hockey away from Alan so they have him where they want and that isn't right.'
> App. at 121-22, 155 (emphasis in original). [FN2]
>
> FN2. The district court described the Garvey Report at great length. See Forbes, 19 F.Supp.2d at 363-64.

The 1991 Alberta Labour Relations Board petition

In June 1991, agent Rich Winter--whose name is listed along with Garvey's on the 1989 report--filed a petition with the Alberta Labour Relations Board on behalf of two NHL players seeking to void the 1988 CBA on the grounds of collusion between Eagleson and the owners. See Forbes, 19 F.Supp.2d at 365. The petition alleged that there was an "arrangement between the NHL and Eagleson pursuant to which Eagleson delivers the players to the NHL under the terms of a Collective Agreement more advantageous to the NHL than it would have been had Eagleson negotiated for the NHLPA in good faith in exchange for which the NHL granted Eagleson the permission he needs to run international hockey." App. at 608. The petition further alleged as follows:

> Eagleson, his family, and various firms or corporations in which he or his family have an interest, had a financial interest in the organization of each of Canada's entries assembled by Eagleson for the World Ice Hockey Championships and the Canada Cup tournaments organized by Eagleson. Eagleson, his family, and various firms or corporations in which he or his family have an interest, received the following in exchange for Eagleson's involvement in organizing these events:

a. fees;

b. profits from the sale of television and other rights for the events initially acquired by Eagleson, his family, or said firms or corporations, at less than fair market value through Eagleson's efforts in breach of Eagleson's fiduciary duties to the NHLPA;

c. free travel and accommodation vouchers;

d. indirect payments received from firms or corporations owned by Arthur Harnett, [insurance broker] Robert Bradshaw, or Harold Ballard but operated and controlled by Eagleson;

e. reimbursement of overhead expenses, some of which had previously been reimbursed by the NHLPA; and

f. payment or reimbursement of the salaries of individuals employed by Eagleson, his family or said firms or corporations for services other than services rendered in respect of the events from which Eagleson arranged for reimbursement.

The [petitioners] estimate the total profits received by Eagleson, his family or firms or corporations in which they have an interest, to be in the millions of dollars.

. . . . .

To assure himself of the NHL's support for his assembling Canada's team at the World Ice Hockey Championships and the Canada Cups, Eagleson agreed with the NHL to use his influence to cause the NHLPA to negotiate for less than it could have achieved in collective bargaining conducted in good faith without such influence....

App. at 611-12.

The petition eventually was dropped on the basis of an agreement of the parties. App. at 645.

The 1991 Eagle-Tribune articles

In September 1991, The Eagle-Tribune of Lawrence, Massachusetts, published a series of articles on the subject of "[i]ntrigue and conflict in the world of big-time hockey." App. at 646-78. These articles discussed the Sports Illustrated article, the Garvey report, and the Alberta Labour Relations Board petition and their contents. The articles in The Eagle-Tribune, however, listed several "major findings," including the following:

> The head of the players' union, Eagleson, has repeatedly placed himself in a position of conflict of interest between players and team owners, and between union and personal business. Some players and other agents charge the players have wound up the losers. Meanwhile, they contend, Eagleson has won the favor of the league and team owners and advanced his own career, becoming perhaps the most powerful man in hockey.
>
> . . . . .
>
> Eagleson became Canada's international hockey czar by obtaining the blessing of NHL owners, with whom he has bargained on behalf of the players. Eagleson also has close ties with NHL executives and some individual owners, but maintains he has been able to remain a tough negotiator for the players.
>
> . . . . .
>
> Hockey players, who face the most restrictive free agent rules in North American professional sports, may have lost a major chance to win free agency when they consented to a 1979 merger between the NHL and the rival World Hockey Association (WHA). As a result, according to one study, hockey salaries have slumped in relation to salaries in the three other major sports.

App. at 646-47. Citing the Sports Illustrated article, The Eagle-Tribune indicated that, because Eagleson needed NHL approval

to use NHL players in international tournaments, "[c]ritics say that makes Eagleson beholden to the same people he has bargained with on behalf of the players." App. at 655.

The 1994 indictment

In March 1994, a grand jury in the District of Massachusetts indicted Eagleson on 32 counts of racketeering, mail fraud, embezzlement of labor organization assets, witness tampering, and accepting kickbacks affecting an employee welfare benefit plan. App. 296. The indictment included specific allegations that, over a period of many years, Eagleson obtained improper personal profits from international tournaments and from his position of control over the players' disability insurance program. The indictment included the following allegations, among others:

> Eagleson stole profits from the sale of rinkboard advertising for various international tournaments--profits which properly belonged to the NHLPA, the NHL, and Hockey Canada. These profits included air travel passes tendered by Air Canada as payment for rinkboard advertising space. Eagleson kept these passes for his personal use and for the use of his family and associates. Eagleson also provided Air Canada with tickets to Canada Cup games in return for air passes which he converted to his own use. The indictment also alleged that Eagleson transferred advertising rights for the 1991 Canada Cup tournament to a company, All Canada Sports Promotions, Ltd. which was controlled by one of Eagleson's business associates, Irving Ungerman, and that All Canada Sports Promotions, Ltd. resold the rights and paid Eagleson a portion of its profit. The indictment further charged that Eagleson's "interest in and involvement with rinkboard advertising sales at international hockey

tournaments, and his arrangement with Air Canada, and income and value derived therefrom, was hidden and undisclosed to the members of the NHLPA," and it alleged that Eagleson made "false and fraudulent representations concerning his activities associated with the Canada Cup tournaments and other international hockey events."
App. at 319.
Eagleson received kickbacks from insurance brokers in exchange for placing the NHLPA's insurance business with those brokers. These kickbacks included cash payments and insurance for Eagleson and his family at little or no cost.
Eagleson falsely represented to NHLPA members that neither he nor his family had received any money from international hockey events.
Eagleson, acting as chief negotiator for Hockey Canada, "paid unnecessary, inappropriate and excessive salaries and incurred other unnecessary and inappropriate expenses on behalf of Hockey Canada, including monies paid to members of Eagleson's family, business associates of Eagleson, and companies with which Eagleson was associated." App. at 314-15.
Eagleson "falsely represented to [NHLPA] members that ... NHLPA expense records were properly kept, and that an 'independent audit' of NHLPA records found no improper benefits or practices." App. at 331.
Eagleson made false representations to two injured players, Glen Sharpley and Bob Dailey, in the course of charging them improper fees for Eagleson's assistance in collecting on their disability claims. When members of the NHLPA raised concerns about Eagleson's behavior toward these two players, Eagleson falsely represented to NHLPA members that Sharpley's claim was a "difficult case" requiring the assistance of outside

counsel. Eagleson did not disclose that Eagleson himself was the outside counsel whose assistance Sharpley paid for. App. at 346.

According to an affidavit from an Assistant U.S. Attorney, the indictment resulted from a "lengthy and comprehensive" investigation which produced information and evidence "much of which was not and is not publicly available." App. at 283-84. [FN3]

FN3. Eagleson eventually pled guilty in January 1998 to an information alleging three counts of mail fraud. Count One alleged that Eagleson sent a letter to NHLPA members in 1989 falsely representing that neither he, norhis family or any company with which he was associated, ever had received any money directly or indirectly frominternational hockey events. Count Two alleged that Eagleson fraudulently converted NHLPA funds to his personal benefit by causing the NHLPA to incur expenses for clothing, theater tickets, and other goods and services. Eagleson sent a letter to NHLPA members in 1989 falsely representing that no such improper expenditures had occurred. Count Three alleged mail fraud based on a 1989 letter from Eagleson to members of the NHLPA which made false representations regarding Eagleson's involvement in the handling of Glen Sharpley's disability claim. App. at 183-96, 370-75.

II. DISCUSSION

A. Accrual of Plaintiffs' Claim

The first question we address is when plaintiffs' Count I claim accrued. While RICO does not include a limitations period for civil claims, the Supreme Court held in Agency Holding

Corp. v. Malley-Duff Assocs., 483 U.S. 143, 156, 107 S.Ct. 2759, 2767, 97 L.Ed.2d 121 (1987), that the four-year limitations period in civil antitrust actions seeking treble damages under the Clayton Act is applicable to RICO actions. [FN4] See also Klehr v. A.O. Smith Corp., 521 U.S. 179, 183, 117 S.Ct. 1984, 1987, 138 L.Ed.2d 373 (1997). That conclusion, however, did not establish when a RICO claim accrues, i.e., when the four-year term starts running. Following the Supreme Court's decision in Malley-Duff, we established our accrual rule in Keystone Insurance Co. v. Houghton, 863 F.2d 1125 (3d Cir.1988), as follows:

> FN4. We are exercising plenary review on this appeal. See Nelson v. Upsala College, 51 F.3d 383, 385 (3d Cir.1995).

> The rule which we announce provides that the limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same 'pattern.' Id. at 1126.

However, due to two Supreme Court opinions, the rule governing the accrual of civil RICO claims has changed several times in recent years and thus Keystone does not remain the law. First, in Klehr the Court specifically rejected the "last predicate

act" portion of our rule in Keystone on the ground that it "creates a limitations period that is longer than Congress could have contemplated." See 521 U.S. at 187, 117 S.Ct. at 1989. The Court noted that other courts of appeals had adopted one of two accrual rules for RICO claims: (1) an "injury and pattern discovery" rule, under which a RICO claim accrues when the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern of racketeering activity, and (2) an "injury discovery" rule, under which a RICO claim accrues when the plaintiff simply discovers or should have discovered his injury. See id. at 185, 117 S.Ct. at 1988-89; Annulli v. Panikkar, 200 F.3d 189, 195 (3d Cir.1999). The Court declined to resolve this conflict, however, choosing instead to leave the matter for another day as the statute of limitations barred the action before it under either formulation. See id. at 191-93, 117 S.Ct. at 1991-92.

In the wake of Klehr, we chose to follow the "injury and pattern discovery" rule; in effect, we adhered to the Keystone rule minus the "last predicate act" exception which the Supreme Court had rejected in Klehr. See Annulli, 200 F.3d at 192, 195; see also Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 656 (3d Cir.1998). Thus, under Annulli, "a civil RICO claim accrues and the statute of limitations begins to run when the plaintiff knew or should have known that each element of a civil RICO claim existed--namely, that he was injured, that the defendant was the source of this injury, and that a pattern of activity prohibited by RICO caused this harm." Annulli, 200 F.3d at 195. The district court applied the "injury and pattern discovery" rule in this case. See Forbes, 19 F.Supp.2d at 356-57.

Earlier this year, however, the Supreme Court rejected the "injury and pattern discovery" rule. See Rotella v. Wood, 528 U.S. 549, 120 S.Ct. 1075, 1078-80, 145 L.Ed.2d 1047 (2000). In its place, the Court contemplated that it eventually would adopt

one of two accrual rules: (1) an injury discovery rule, or (2) an "injury occurrence rule" under which knowledge of injury would be irrelevant. The Court, however, again left the matter unsettled, as it decided that at that time it would not choose between the rules. See id. at 1080 n. 2.

Thus, once again we must make a decision regarding when a RICO action accrues even though we are aware that the Supreme Court ultimately may accept or reject our choice. After careful consideration, we will adopt an injury discovery rule rather than an injury occurrence rule. We do so for what seems to us to be the sound reason that the injury discovery rule is in harmony with the general notion that a discovery rule applies whenever a federal statute of limitation is silent on the issue. [FN5] Under the injury discovery rule, we must determine when the plaintiffs knew or should have known of their injury. Thus, we alter the judicial landscape unfavorably to the plaintiffs from the shape in which it existed when this case was before the district court and consider the case under an accrual rule more adverse to plaintiffs than that the district court applied.

> FN5. The parties do not dispute that Rotella applies retroactively to this case.

We, of course, start with the complaint. Count I of plaintiffs' fourth amended complaint describes the alleged injury as follows:

> 64. The object and purpose of the racketeering activity ... was to cause Eagleson ... and the NHLPA to come under the influence and control of the NHL, the Member Clubs, Ziegler, and Wirtz, and to fail to aggressively represent the interests of the NHLPA players by granting unreasonable concessions to and failing to seek benefits from the NHL and the Member Clubs during the period from the mid-1970's through at

> least the end of 1991.... The further object and purpose was to enable the Member Clubs to pay far less in compensation to the NHLPA players then they would otherwise have paid, thereby unjustly enriching themselves at the players' expense.
>
> . . . . .
>
> 72. As a direct and proximate result of the conduct of defendants described above, the plaintiffs and each member of the plaintiff class have been injured in their business or property, as provided, in 18 U.S.C. § 1964(c), including, but not limited to, losses of hundreds of thousands of dollars, each, in salary and other benefits which they would have earned as employees of the Member Clubs but for the illegal activity set forth above.

App. at 67-68.

On the record before us, it is clear as a matter of law that plaintiffs were aware, or should have been aware, of the injuries they alleged at least as early as 1989. The Garvey report, issued to NHLPA members that year, argued extensively that NHL players were receiving reduced salary and benefits as a result of Eagleson's failure to engage in vigorous collective bargaining. The report stated that "[n]o benefits of any significance have been achieved in the entire decade of the 80's through collective bargaining" and charged that "the [NHLPA] has gone backward while sports unions in all other sports have made major gains." The report presented statistics to show that NHL players are "last [in professional sports] in salaries, benefits, percentage of gross, and in information." App. at 106. The report argued that Eagleson's failure to bargain vigorously against the NHL owners was the reason for the players' poor situation:

> Frankly, if any other union leader did what Alan Eagleson has done over the past 22 years, the news

media would be screaming for an investigation. The conflicts of interest are shocking, but even more shocking is a pattern of sweetheart agreements with the NHL over all these years. It may sound harsh, but he has not pursued player interests at critical times in your history as a union. There is a legitimate question whether there is, in fact, a 'players' association. For the most part, it seems that Alan runs the Association as his private preserve....

. . . . .

Last on the list [of professional sports with respect to such matters as free agency, impartial arbitration, and players' percentage of gross revenues] is the NHL. Last because the Players Association under Alan Eagleson has never been prepared for bargaining. We don't know how tough the NHL is at the bargaining table because they have never been tested. Never a serious law suit filed against the league to obtain free agency, and, when they had it handed to them on a plate with the proposed WHA NHL merger, Eagleson gave away player freedom without a whimper.

. . . . .

Alan Eagleson is a brilliant attorney and politician. He admits that John Ziegler is one of his best friends and Bill Wirtz, who lives near him in Florida, is an extremely close friend despite the fact that Wirtz is the chief negotiator for the NHL. Given his brilliance, there is really no excuse for the lack of preparation for bargaining except one--he does not take bargaining seriously because he is comfortable with the cozy relationship that has been so good for him....

. . . . .

Alan Eagleson has been a vital part of the NHL establishment. He has contributed greatly [through his failure to bargain aggressively with the owners] to

> keeping salaries down, profits up. He has helped maintain [the NHL's] monopoly status, he keeps players tied up [by failing to bargain for free agency], he allows the League to control through non-impartial arbitration; he eliminates freedom whenever it raises its ugly head; and he keeps you in the dark on the economics of the League while singing management's song about the 'fragile' NHL.

App. at 109, 110, 112, 145 (emphases in original).

We have no doubt that by 1989 (and probably earlier), NHL players were aware that they did not enjoy similar salaries, free agency rights, or other advantages available to players in other professional sports. Furthermore, we do not understand how anyone who has considered the Garvey report--which was commissioned at the behest of some 200 NHL players--can doubt that it should have led the players to believe that their situation was largely a result of the "cozy" collective bargaining relationship between Eagleson on the one hand and Ziegler, Wirtz, and the owners on the other. Thus, by 1989 at the latest, plaintiffs were aware, or should have been aware, of the injury which they allege in Count I (reduced salary and benefits) and the source of the injury (the improper bargaining behavior by Eagleson). Under an injury discovery rule, nothing more was required to trigger the running of the four-year limitations period. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir.1994) (limitations period commences when "plaintiff has discovered or, by exercising reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party's conduct"; "We have in the past stated that a claim accrues in a federal cause of action upon awareness of actual injury, not upon awareness that this injury constitutes a legal wrong"). [FN6]

FN6. Plaintiffs contend that the district court made errors

> with respect to its allocation of the burden of proof. If we were reviewing a judgment entered by the district court predicated on findings made at a nonjury trial we would be obliged to consider these contentions but inasmuch as we are exercising plenary review of a summary judgment, we have no need to make an analysis of the district court's allocation of the burden of proof. After all, we are applying the law ourselves to the historical facts and, even though we reach the same result as did the district court, we make our determinations on the basis of the law as we find it to be for the reasons we have set forth. Thus, it does not matter whether the district court erred with respect to placing the burden of proof as we do not defer to its decision.

Indeed, possibly aware that clearly their Count I claim accrued prior to November 7, 1991, the plaintiffs argue that--regardless of their awareness of the alleged injury--the statute of limitations was tolled until 1994 (when Eagleson was indicted) because defendants' acts of fraudulent concealment prevented them from learning facts essential to pleading the predicate acts of bribery underlying their Count I claim. Thus, we now turn to the issue of fraudulent concealment.

B. Fraudulent Concealment

In Rotella, the Supreme Court stated that, "[i]n rejecting pattern discovery as a basic rule, we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty...." Rotella, 120 S.Ct. at 1084 (citation omitted). Unlike the discovery rule, which determines the time

of the initial commencement of a limitations period, "[e]quitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed." Oshiver, 38 F.3d at 1387. Among the circumstances warranting equitable tolling are situations where "the defendant has actively misled the plaintiff respecting the plaintiff's cause of action," i.e. fraudulent concealment. Id. at 1387. "[W]here the plaintiff has been actively misled ... the equitable tolling doctrine provides the plaintiff with the full statutory limitations period, starting from the date the facts supporting the plaintiff's cause of action either become apparent to the plaintiff or should have become apparent to a person in the plaintiff's position with a reasonably prudent regard for his or her rights." Id. at 1389. We have described the differences between the discovery rule inquiry and the equitable tolling inquiry as follows:

> [T]he discovery rule and the equitable tolling doctrine are similar in one respect and different in another. The doctrines are similar in that each requires a level of diligence on the part of the plaintiff; that is, each requires the plaintiff to take reasonable measures to uncover the existence of injury. The plaintiff who fails to exercise this reasonable diligence may lose the benefit of either doctrine. The two doctrines differ, however, with respect to the type of knowledge or cognizance that triggers their respective applications. The discovery rule keys on a plaintiff's cognizance, or imputed cognizance, of actual injury. Equitable tolling, on the other hand, keys on a plaintiff's cognizance, or imputed cognizance, of the facts supporting the plaintiff's cause of action. Underlying this difference between the discovery rule and equitable tolling is the more fundamental difference in purpose between the two rules. The purpose of the discovery rule is to determine the accrual date of a claim, for ultimate purposes of determining, as a legal matter, when the

> statute of limitations begins to run. Equitable tolling ... presumes claim accrual. Equitable tolling steps in to toll, or stop, the running of the statute of limitations in light of established equitable considerations.

Id. at 1390 (emphasis added) (citations and footnotes omitted).

We have indicated that the plaintiff has the burden of proving fraudulent concealment. See In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1179 (3d Cir.1993). The plaintiff must show active misleading by the defendant, see Oshiver, 38 F.3d at 1391 n. 10, and must further show that he exercised reasonable diligence in attempting to uncover the relevant facts. See id. at 1390; see also Klehr, 521 U.S. at 194, 117 S.Ct. at 1993 (in the civil RICO context, " 'reasonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment.' "). Further, the plaintiff must show that he actually was "mis[led] ... into thinking that he d[id] not have a cause of action," Davis v. Grusemeyer, 996 F.2d 617, 624 (3d Cir.1993); in other words, the tolling lasts only "until the plaintiff knows, or should reasonably be expected to know, the concealed facts supporting the cause of action...." Oshiver, 38 F.3d at 1392. Thus, ordinarily when plaintiffs seek to demonstrate a case for equitable tolling, and defendants seek summary judgment on the issue, a court must determine (1) whether there is sufficient evidence to support a finding that defendants engaged in affirmative acts of concealment designed to mislead the plaintiffs regarding facts supporting their Count I claim, (2) whether there is sufficient evidence to support a finding that plaintiffs exercised reasonable diligence, and (3) whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim until a time within the limitations period measured backwards from when the plaintiffs filed their complaint. Absent evidence to support these findings there is no genuine dispute of material fact on the issue

and the defendants are entitled to summary judgment. See Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 87-88 (3d Cir.2000).

We will assume without deciding that the defendants, particularly Eagleson, engaged in affirmative acts of concealment designed to mislead plaintiffs about a fact supporting their Count I claim--namely, the fact that Eagleson was profiting personally from his control over the international tournaments and the disability insurance program. We also will assume without deciding that the plaintiffs exercised reasonable diligence in an attempt to uncover the relevant facts. Nevertheless, we will affirm the order for summary judgment as the plaintiffs either knew or reasonably should have known the facts supporting their course of action well prior to four years before they brought this case on November 7, 1995.

As the NHL defendants correctly indicate, the allegations in the Complaint against them appeared in the 1984 Sports Illustrated article and 1989 Garvey Report, and a virtual carbon copy of the complaint was filed with the Alberta Labour Relations Board before the limitations period expired. See app. at 601-44. Thus, the plaintiffs knew of sufficient facts to support their claim at least 6 years before they filed this case. In particular, they certainly knew of Eagleson's poor representation of them and that, with the cooperation of the NHL defendants, he was profiting from international hockey through use of the players' labors. Although it is true that Eagleson denied wrongdoing, nonetheless, his denials do not allow plaintiffs, who were aware of their potential claim, to allege ignorance. Moreover, inasmuch as civil RICO actions tend to arise in business situations in which the defendants will deny wrongdoing, an expansive application of tolling rules will create a limitations period beyond what Congress contemplated. See Klehr, 521 U.S. at 187, 117 S.Ct. at 1989.

We also point out that while the Supreme Court in Rotella indicated that "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be ..." applicable, Rotella, 120 S.Ct. at 1084, there was nothing obscure about the actionable conduct here. The Garvey report said the "conflicts of interest are shocking" and "even more shocking is a pattern of sweetheart agreements." App. at 109. Furthermore, it had been evident for many years that Eagleson used his position for personal illegitimate gain.

We recognize that plaintiffs insist they lacked sufficient information until Forbes was indicted to plead their RICO claim consistently with Fed.R.Civ.P. 11 and, indeed, support this contention with their affidavits. But we are satisfied that plaintiffs' statements on this point do not create a genuine dispute of fact precluding the district court from granting summary judgment on the tolling issue as the unmistakable historical facts demonstrate that the plaintiffs were aware or should have been aware of the facts supporting their Count I claim long before November 7, 1991. Thus, contrary to plaintiffs' position, we have no doubt that they and their attorneys could have signed a federal complaint consistently with Rule 11 prior to November 7, 1991. [FN7] As the district court noted, plaintiffs "could have actually pled almost every allegation in their complaint concerning defendants alleged § 302 violations" based on the facts contained in the various publications available to them. Forbes, 19 F.Supp.2d at 372. Furthermore, the Garvey report which was available to them long before November 7, 1991, gave the plaintiffs an additional basis for the action.

> FN7. Plaintiffs seem to contend that prior to its amendment in 1993 Rule 11 placed a more stringent burden on a person signing a pleading than it did following the amendment and that we should consider the effect of Rule 11 as it existed prior to the amendment.

> We are satisfied, however, that Rule 11, either before or after 1993, was not an impediment to plaintiffs bringing this action long before they did so.

Although Rule 11 imposes a duty of reasonable inquiry as to the facts set forth in a pleading, Dura Systems, Inc. v. Rothbury Investments, Ltd., 886 F.2d 551, 556 (3d Cir.1989), "[i]t is not necessary that an investigation into the facts be carried to the point of absolute certainty." Kraemer v. Grant County, 892 F.2d 686, 689 (7th Cir.1990). We so held in Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 95 (3d Cir.1988) (citations omitted), in which we overturned an award of sanctions under Rule 11 indicating,

> At the time plaintiffs' counsel filed the [antitrust] complaint here, he knew facts that supported a reasonable suspicion of cooperation between defendants and other parties who could have been expected to benefit from the defendants' intransigence. These factual circumstances and the rational inferences that may be drawn from them convince us that the allegations of the first count comported with Rule 11's pre-filing investigation requirement.

See also Morda v. Klein, 865 F.2d 782, 785-86 (6th Cir.1989) ("It would be particularly difficult to fault plaintiffs for a lack of prefiling inquiry when, as here, defendants have refused plaintiffs access to material information that would bear on certain allegations made in the complaint."). In this regard we point out that "[a] signer's obligation personally to comply with the requirements of Rule 11 clearly does not preclude the signer from any reliance on information from other persons." Garr v. U.S. Healthcare, Inc., 22 F.3d 1274, 1278 (3d Cir.1994). It is inconceivable to us that if plaintiffs had brought this action in a timely fashion and had been unsuccessful that a court would have found that the imposition of Rule 11 sanctions against them for having filed the complaint would have been appropriate.

[FN8]

FN8. We are not holding that merely because plaintiffs could have filed their complaint long before they did without violating Rule 11, that their failure to do so precludes tolling on a fraudulent concealment basis. Rather, we simply are holding that Rule 11 does not save plaintiffs' claim in the circumstances of this case. We do not determine whether there is a class of claims in which the statute of limitations is tolled even though the potential plaintiffs could have filed a complaint during the tolling period without violating Rule 11.

Finally, we are not impressed with the plaintiffs' argument that they were justified in delaying bringing their action as the government, notwithstanding its resources, did not obtain an indictment until 1994 after it completed its investigation. After all, even though RICO is a criminal statute, surely civil RICO cases are brought in situations in which it is hardly conceivable that there could be a criminal indictment. See Tabas v. Tabas, 47 F.3d 1280, 1302, 1310 (3d Cir.1995) (en banc) (Greenberg, J., dissenting). Thus, the mere fact that the government did not obtain an indictment before a time within plaintiffs' four-year statute of limitations period does not mean that the statute of limitations in this case should be deemed equitably tolled until the return of the indictment.

III. CONCLUSION

For the foregoing reasons the orders for summary judgment entered August 27, 1998, and September 10, 1999, as made final by order entered October 14, 1999, will be affirmed.

United States District Court,
E.D. Pennsylvania

David S. FORBES, et al.
v.
R. Alan EAGLESON, et al.
No. CIV.A. 95-7021.
Aug. 27, 1998.

Alice W. Ballard, Samuel & Ballard, P.C., Philadelphia, PA, Martin Oberman, Chicago, IL, Edward Garvey, Garvey and Associates, Madison, WI, for Plaintiffs.

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Bennett G. Picker, Stradley Ronon Stevens & Young LLP, Philadelphia, PA, for Defendants Philadelphia Flyers Limited Partnership, Boston Professional Hockey Association, Inc., Niagara Frontier Hockey, L.P., Calgary Flames Limited Partnership, Chicago Blackhawk Hockey Team, Inc., Dallas Hockey Club, Inc., Detroit Red Wings, Inc., Edmonton Oilers Hockey Corp., Ktr Hockey Limited Partnership, Le Club De

Hockey Canadien, Inc., Meadowlanders, Inc., New York Islanders Hockey Club, L.P., Rangers Hockey Club, A Division of Madison Square Garden Center, Inc., Pittsburgh Hockey Associates, Comsat Entertainment Group, Inc., a subsidiary of Comsat Corporation, St. Louis Blues Hockey Club, L.P., San Jose Sharks Corp., Maple Leaf Gardens, Limited, Vancouver Hockey Club, Ltd., Washington Hockey Limited Partnership, Jets Hockey Ventures, (A Limited Partnership).

MEMORANDUM

O'NEILL, District Judge.

Plaintiffs David S. Forbes, Richard D. Middleton, D. Bradford Park, Ulf Nilsson, and Douglas D. Smail are former National Hockey League players. Alleging that their union, the NHL Players Association ("NHLPA"), was co-opted by the NHL and pilfered by their own union leader for nearly two decades, plaintiffs bring this suit as a putative class action on behalf of all players employed by NHL teams between 1972 and 1991 against R. Alan Eagleson, former executive director of the NHLPA; several businesses owned or controlled by Eagleson, Jialson Holdings, Ltd., Sports Management, Ltd., Rae-Con Consultants, Ltd., and Eagleson, Ungerman, a law firm (the "Canadian defendants"); and the NHL, its Member Clubs, and two NHL officials, John Ziegler, President of the NHL from 1977 to 1992, and William W. Wirtz, Chairman of the Board of Governors of the NHL (the "NHL defendants").

Plaintiffs' two-count fourth-amended complaint charges defendants with racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964. Count I alleges, in essence, that the NHL defendants and Eagleson maintained a collusive, quid pro quo

arrangement in violation of federal anti-bribery labor law pursuant to which Eagleson forsook the players' interests in collective bargaining with the NHL. Count II alleges that Eagleson and the Canadian defendants engaged in a variety of schemes to pilfer union funds in violation of anti-embezzlement and mail fraud statutes.

The NHL defendants and Eagleson have moved to dismiss or for summary judgment as to Count I on grounds that plaintiffs' claims are barred by the statute of limitations. [FN1] Fed. R. Civ. Proc. 12(b)(6), 56. The parties have presented substantial material extraneous to the pleadings in the course of extensive briefing on the motion and have been notified that the motion will be treated as one for summary judgment.

> FN1. Eagleson and the Canadian defendants seek dismissal or summary judgment as to both Counts I and II of plaintiffs' complaint, but as grounds therefor rely only on the NHL defendants' arguments, which concern only Count I. Since the Canadian defendants have offered neither argument nor evidence in support of dismissing Count II, plaintiffs have not attempted to defend its timeliness. For this reason and because the two counts are not based on identical causes of action, only Count I will be addressed in this opinion.

I.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). In resolving the motion, I view the evidence and all reasonable inferences to be drawn therefrom in favor of plaintiffs as the

non-moving parties. See, e.g., Reitz v. County of Bucks, 125 F.3d 139, 143 (3d Cir.1997).

Where the party moving for summary judgment bears the burden of proof, as defendants do with respect to their statute of limitations defense, the movant "must make an affirmative showing that it is entitled to summary judgment." McGrath v. City of Philadelphia, 864 F.Supp. 466, 473 (E.D.Pa.1994); see also National State Bank v. Federal Reserve Bank, 979 F.2d 1579, 1581-82 (3d Cir.1992). The "applicability of the statute of limitations usually implicates factual questions as to when plaintiff discovered or should have discovered the elements of the cause of action; accordingly, 'defendants bear a heavy burden in seeking to establish as a matter of law that the challenged claims are barred.' " Davis v. Grusemeyer, 996 F.2d 617, 623 n. 10 (3d Cir.1993), quoting Van Buskirk v. Carey Canadian Mines, Ltd., 760 F.2d 481, 498 (3d Cir.1985). [FN2]

> FN2. Plaintiffs appear to contend that decision of the motion for summary judgment is premature at this stage of the litigation because they have not yet had an opportunity to conduct discovery of defendants. However, as to allegations concerning defendants' alleged conduct for which discovery might be pertinent--including their alleged fraudulent concealment--I will take plaintiffs' well-pleaded allegations as true and draw all reasonable inferences from them in plaintiffs' favor. Thus, the only potential factual issues relevant to decision of this motion concern plaintiffs' knowledge of their claims in light of media reports and other matters of public record, and as to such issues I cannot conceive how discovery of information not already available to plaintiffs could be relevant. The crux of plaintiffs' argument throughout the lengthy briefing on this motion has been that the information

available to hockey players prior to the limitations period was insufficient to give them notice that Eagleson and the NHL defendants had engaged in a pattern of illegal management-labor bribery. (See, e.g., Pls. B. at 6; Pls. Surreply B. at 2.) Whether a reasonable jury could agree with this claim is a question which this Court may and will decide on motion for summary judgment.

II.

Civil RICO claims are subject to a four-year statute of limitations. Agency Holding Corp. v. Malley-Duff and Assoc., Inc., 483 U.S. 143, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). The question presented here is whether plaintiffs' claims accrued more than four years before they filed suit on November 7, 1995--that is, before November 7, 1991. If so, their claims are untimely unless the statute of limitations was tolled.

This is the second occasion on which I have been asked to determine whether plaintiffs' claims are barred by the statute of limitations. In denying defendants' previous motion, I relied upon the Third Circuit's unique "last predicate act" accrual rule for civil RICO as set forth in Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir.1988). See 1996 WL 420829. That rule has since been invalidated by the Supreme Court's decision in Klehr v. A.O. Smith Corp., 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997), which plaintiffs concede applies retroactively to this case.

While the Klehr Court invalidated the Third Circuit's last predicate act exception, it did not establish which of the remaining rules followed by the various Court of Appeals should be applied. The parties, unsurprisingly, disagree on what rule should be adopted in Klehr 's wake. Defendants argue for the "pure injury" accrual rule used in Clayton Act antitrust cases,

pursuant to which a claim accrues and the limitations period begins to run as soon as the plaintiff is injured. See Klehr, 117 S.Ct. at 1995 (Scalia, J. concurring) (advocating adoption of pure injury accrual rule). Plaintiffs argue that, aside from its "last predicate act exception," Keystone remains good law and compels application of a discovery accrual rule pursuant to which a plaintiff must have notice of all elements of a RICO claim before the limitations period starts to run.

Keystone established both a general discovery accrual rule and a "last predicate act" exception as follows:

> [T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have know that the elements of a civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same 'pattern.'

Keystone, 863 F.2d at 1130 (emphasis added). The effect of the exception allowed plaintiffs to use any predicate act within the statute of limitations period to recover for any and all past injuries caused by a RICO conspiracy, no matter how much time had passed or what plaintiffs had known or should have known of their claims. It was rejected by the Supreme Court because, among other things, it potentially resulted in dramatically lengthened limitations periods and allowed plaintiffs to sleep on their claims while treble damages accumulated, contrary to civil RICO's purpose of encouraging private persons to investigate possible racketeering activity. Klehr, 117 S.Ct. at 1989-90.

The Court did not, however, purport to disturb Keystone's general rule (also known as the "injury plus source plus pattern" discovery rule) that the statute of limitations period for a civil RICO claim "runs from the date the plaintiff knew or should have know that the elements of a civil RICO cause of action existed." See Klehr, 117 S.Ct. at 1989, 1992. To the contrary, the Court expressly reserved judgment on whether a "discovery" accrual rule was appropriate for civil RICO cases, and if so, just what must be discovered for a claim to accrue. Klehr, 117 S.Ct. at 1992. Klehr does not, therefore, compel re-examination of the Third Circuit's general discovery rule.

Nor do I see any other reason to call into question the continued viability of the "injury plus source plus pattern" discovery rule. The Keystone Court adopted that rule, which is also followed by the Eighth Circuit and similar to the "injury plus pattern" rules followed in the Tenth and Eleventh Circuits, see Klehr, 117 S.Ct. at 1988-89, 1992, only after carefully reviewing and rejecting other accrual rules, such as that advocated by defendants, which look only to when an injury occurred or was discovered. The Court found these other rules inappropriate to the RICO context because they fail to take into account the central "pattern of racketeering activity" element of a RICO violation:

> The Supreme Court ... has made it clear that "the heart of any RICO complaint is the allegation of a pattern of racketeering." Malley-Duff, 107 S.Ct. at 2766 ... In Sedima [v. Imrex Co.,] the Supreme Court clarified the fact that "the essence of the violation is the commission of those [predicate] acts in connection with the conduct of an enterprise." 473 U.S. [479] at 497, 105 S.Ct. [3275] at 3285, 87 L.Ed.2d 346 (1985). Given the Supreme Court's emphasis on the pattern element as the core of the violation, the simple discovery rule's focus on injury is misplaced.

863 F.2d at 1133 (alteration in original); see also Klehr, 117 S.Ct. at 1990 (noting in dicta that the injury accrual rule of the Clayton Act might not necessarily be appropriate for RICO cases because "civil RICO requires not just a single act, but rather a 'pattern' of acts"). I therefore conclude that it remains the law of this Circuit that a civil RICO claim accrues when the plaintiff "knew or should have known that the elements of a civil RICO cause of action existed." Accord Perlberger v. Perlberger, 1998 WL 76310, *5 (E.D.Pa.1998).

The elements of a RICO cause of action are the (1) conducting of (2) an enterprise (3) through a pattern of (4) racketeering activity (5) causing plaintiffs injury in their property or business. Alberici v. United States Dept. of Justice, 1992 WL 57922, *3 (E.D.Pa.); see also Keystone, 863 F.2d at 1128; 18 U.S.C. §§ 1962, 1964. [FN3] Thus, plaintiffs' claims accrued and the statute of limitations began to run when they discovered or should have discovered that defendants had possibly engaged in conduct constituting the alleged pattern of racketeering and that this conduct had possibly caused them injury. [FN4] "Awareness that each element comprising a RICO claim is present is crucial while cognizance of the legal implication of these facts, that is, that there is a civil RICO cause of action, is irrelevant." Keystone, 863 F.2d at 1128.

FN3. A "pattern" of racketeering activity "requires at least two acts of racketeering activity" committed within ten years of each other. 18 U.S.C. § 1961(5).

FN4. The qualification "possibly" is important. "If a plaintiff were entitled to have all the time he needed to be certain his rights had been violated, the statute of limitations would never run--for even after judgment, there is no certainty." Cada v. Baxter Healthcare Corp.,

920 F.2d 446, 451 (7th Cir.1990).

Plaintiffs contend they did not and could not learn sufficient facts to bring this action until 1994 due to defendants' fraudulent concealment. Fraudulent concealment is an equitable tolling doctrine read into every federal statute of limitations. [FN5] Davis v. Grusemeyer, 996 F.2d 617, 624 (3d Cir.1993). Fraudulent concealment will toll the running of the limitations period "only if it misleads a plaintiff into thinking that he does not have a cause of action. 'The doctrine ... does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim.' " Id. at 624 (quoting Hobson v. Wilson, 737 F.2d 1, 35 (D.C.Cir.1984).) To successfully invoke the doctrine, plaintiffs must therefore show not only that they remained ignorant of their cause of action into the limitations period, but that their ignorance was not due to their own lack of reasonable diligence. Klehr, 117 S.Ct. at 1993; Davis, 996 F.2d at 625. Since "the means of knowledge are the same thing in effect as knowledge itself," Wood v. Carpenter, 101 U.S. (11 Otto) 135, 25 L.Ed. 807 (1879), plaintiffs will be charged with notice of their claim if they had both inquiry notice and means reasonably at hand to discover facts necessary to assert their claim.

> FN5. "Fraudulent concealment" has been invoked with respect to a variety of tolling doctrines. See generally Cada, 920 F.2d at 450-51.

Insofar as plaintiffs contend that defendants concealed facts essential to their cause of action. I think it clear that the doctrine of fraudulent concealment adds nothing to analysis of the timeliness of plaintiffs' claim not already implicit in the RICO discovery rule. Like the discovery rule, fraudulent concealment will delay the running of the statute of limitations until plaintiffs discovered, or in the exercise of reasonable

diligence should have discovered, all the elements essential to their RICO claim. See, e.g. Hodges v. National Basketball Assoc., 1998 WL 26183 at *3 (N.D.Ill.1998) (doctrine of fraudulent concealment tolls the statute of limitations when defendants have successfully concealed "vital information bearing on the existence of [a] claim"). To the extent that a defendant's concealing efforts succeed, "they postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of a fraud ... They are thus within the domain of the discovery rule." Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir.1990); see also Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946) ("where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party' ") (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348, 22 L.Ed. 636 (1874)).

However, plaintiffs might also be understood as invoking "fraudulent concealment" in another sense--one which "presupposes that the plaintiff had discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant--above and beyond the wrongdoing upon which the plaintiff's claim is founded--to prevent the plaintiff from suing in time." Cada, 920 F.2d at 451. For example, an age-discrimination plaintiff presented with forged documents seeming to negate any reason he might have had to think his firing was related to his age would have a good case for tolling the statute of limitations. Id.

In this second sense, then, fraudulent concealment refers to a defendant's affirmative (and successful) efforts to mislead the plaintiff as to the nature or significance of facts which would

have shown the existence of a claim. However, as with the discovery rule and equitable tolling, a plaintiff who is not reasonably diligent in attempting to discover his or her claims will not enjoy the tolling of the limitations period simply because the defendant engaged in fraudulent concealment. Klehr, 117 S.Ct. at 1993. [FN6]

> FN6. Plaintiffs are thus incorrect in asserting that because defendants engaged in fraudulent concealment they had to have "actual knowledge" of their claim before the statute of limitations could begin to run. While defendants' conduct may, of course, be among the circumstances against which the reasonableness of a plaintiff's diligence is judged, see e.g., Salois v. Dime Savings Bank, 128 F.3d 20, 26 (1st Cir.1997), RICO plaintiffs must exercise reasonable diligence under the circumstances regardless of defendants' concealment. Klehr, 117 S.Ct. at 1993; Davis, 996 F.2d at 625. Accordingly, constructive notice is always sufficient to start the statute of limitations running.

With these principles in mind, I turn to plaintiffs' allegations and the evidence defendants contend shows that plaintiffs had or should have had notice of their claim prior to November 7, 1991.

A.

Defendant R. Alan Eagleson was executive director of the NHLPA, the exclusive bargaining unit of NHL players, from the union's inception in 1967 until the end of 1991. Essentially singlehandedly, he operated the union's daily business and conducted the players' collective bargaining negotiations with the NHL. He also engaged in business for himself as an agent and lawyer representing players and even management personnel in

their individual contract negotiations with club owners.

Plaintiffs allege that from 1976 through 1991 the NHL defendants gave Eagleson unsupervised control of a joint NHL-NHLPA venture which participated in international hockey tournaments. They also granted permission for NHL players to participate in the extra-NHL events, which would otherwise have been prohibited by the players' contracts. The participation of the best NHL players was essential to the success of the tournaments. (Comp.¶ 28.)

As head of the joint venture and as chief negotiator for the International Committee of Hockey Canada, a non-profit organization which negotiated international hockey events for Canada, Eagleson organized some two dozen or more tournaments from 1976 to 1991, including five Canada Cups and nearly annual World Championships and Soviet Union team exhibition tours. For each Canada Cup, Hockey Canada was to be paid the first $600,000 of net tournament proceeds after expenses and 15% of net revenues above $2 million. All other net revenues were to be split equally between the NHL clubs and the NHLPA. [FN7] The NHL players earned little additional pay for playing in the tournaments and were induced to participate on the understanding that they would be benefiting their pension fund. In fact, plaintiffs allege, with Eagleson's assent the NHL defendants simply reduced their contributions to the pension fund by however much the players contributed through international hockey.

FN7. The NHL-NHLPA venture concerned both the Canada Cups and other international hockey events (Comp.¶ 32), but the Canada Cups were evidently the most financially significant and are the focus of plaintiffs'

allegations.

Eagleson allegedly used his control over international hockey to enrich himself and his associates. He (1) directed revenue from sales of television and rinkboard advertising rights to himself and associates; (2) appropriated air travel passes obtained from Air Canada in exchange for advertising rights for his personal use and that of family and associates; (3) charged excessive rents for office space; and (4) obtained excessive reimbursement for the legal services of his law firm and for the services and expenses of employees of other of his private businesses who were "lent" to the international hockey venture to coordinate the tournaments. Many of these schemes reduced the net proceeds to be divided between the NHLPA and the NHL pursuant to their joint venture. (Comp.¶¶ 36-42). [FN8]

> FN8. Count II defendants Jialson Holdings, Sports Management, Rae-Con Consultants, Ltd., and Eagleson, Ungerman were allegedly party to Eagleson's schemes to pilfer international tourney revenues as well as other union funds.

In addition, from 1977 to 1986 the NHL defendants gave Eagleson the power to place the NHL's disability insurance policies for the players. (He also controlled the NHLPA's insurance funds.) Eagleson allegedly used his control over the disability insurance funds to extort personal benefits from insurance brokers and sham legal fees from players seeking disability benefits. (¶ 43.)

The crux of plaintiffs' claim against the NHL defendants is that they knew that Eagleson was using his control of international hockey and NHL disability insurance funds to enrich himself, but nonetheless allowed him to continue to

exercise these powers unconstrained. (Comp.¶¶ 44, 47, 49-50, 64.) This acquiescence, plaintiffs allege, amounted to a pattern of violations of § 302 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 186. Violations of § 302 constitute predicate acts of racketeering under 18 U.S.C. § 1961(1)(C) (defining as a "racketeering activity" any act indictable under 29 U.S.C. § 186). (Comp.¶¶ 46, 63.)

Section 302 prohibits employers, employer associations, and their agents from paying money or any other "thing of value" to employee representatives, and prohibits employee representatives from accepting any such payment. [FN9] 29 U.S.C. § 186(a), (b). Plaintiffs allege that the NHL defendants violated § 302(a) each time they permitted NHL players to participate in an international tournament, gave Eagleson unsupervised control over a tournament and its revenues, failed to hold Eagleson accountable for the revenues and/or overlooked his financial improprieties, and allowed him control over placement of the NHL's disability insurance premiums. Concomitantly, Eagleson allegedly violated § 302(b) every time he accepted control of an international tournament or the purchase of disability insurance. (Comp.¶¶ 47-49.) [FN10]

FN9. Section 302 provides:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce:....
>
> (b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section....
>
> FN10. Count I also alleges that Eagleson committed predicate acts of mail fraud and obstruction of justice in violation of 18 U.S.C. §§ 1341, 1346, and 1512(b) in attempting to conceal his wrongdoing. See 18 U.S.C. § 1961(1). In addition, plaintiffs contend that Eagleson's predicate acts can be imputed to the NHL defendants and vice versa because they were co-conspirators.

In return for the NHL defendants' facilitation of and acquiescence in his self-enriching schemes, Eagleson allegedly betrayed the interests of the players in collective bargaining. Without attempting to gain concessions in return or marshal the players' collective leverage, he agreed to the 1979 merger of the NHL and World Hockey Association (WHA), lack of free agency, supplemental drafts, equalization rules, and non-disclosure of players' salaries; he acquiesced in the removal of player representatives from the board of the players' pension funds and in the owners' practice of offsetting pension contributions by the amount the players contributed via international hockey; and he agreed to inadequate minimum salaries. As a result, the players' compensation was substantially suppressed from what it would have been had they been

represented by an un-compromised and aggressive union negotiator. (Comp.¶¶ 51-52.)

Eagleson negotiated collective bargains between the NHL and the NHLPA signed in 1976, 1981, 1984, and 1988. The last Eagleson-negotiated collective bargain expired in September 1991 and Eagleson's employment with the NHLPA terminated in December 1991.

B.

As evidence that plaintiffs had or should have had knowledge of their cause of action by September 1991, at the latest, defendants point to a 1984 Sports Illustrated expose of Eagleson; a 1989 report on Eagleson's stewardship of the union (the "Garvey report") issued by investigators acting at the behest of a large number of hockey players; a complaint filed on behalf of two players with the Alberta Labor Relations Board in June 1991 seeking to void the players' collective bargaining agreement on grounds of collusion between the union and the NHL; and a series of investigative articles on the NHL and the union published in September 1991 by The Eagle-Tribune of Lawrence, Massachusetts.

Plaintiffs. on the other hand, contend that they did not and could not obtain sufficient, verifiable information to know and plead their claims until a federal grand jury indictment was issued in 1994 charging Eagleson with 32 counts of racketeering, embezzlement from a labor union, receipt of kickbacks affecting an employee welfare benefit plan, mail fraud, and obstruction of justice.

1.

The Sports Illustrated article, published in July 1984 and

entitled "The Man Who Rules Hockey," began with these assertions, among others:

> From an unshakable power base rooted in 17 years of near-dictatorial rule as executive director of the NHL Players' Association, and fueled by what one associate calls "an ego the size of Guatemala," Eagleson, 51, has spread his personal and corporate influence from his Toronto offices into virtually every aspect of hockey in which there's a dollar to be made. Because he holds the ultimate bargaining chip--100% of the world's best professional hockey players--scarcely anything of import can happen in the sport without the approval, if not the direct participation, of Eagleson.
>
> However, there's evidence that Eagleson has at times abused his multiple powers as head of the NHLPA, chief negotiator for Hockey Canada (the nonprofit corporation that administers Canada's participation in major international events) and personal representative of many of the NHL's stars specifically for his personal gain and the gain of his friends.
>
> .... Eagleson rules hockey from atop a sort of international pyramid, because he's likely to be negotiating today against the side he'll be representing at a different bargaining table tomorrow. Ultimately, Eagleson's or his clients' interests are represented on virtually every side of every deal in hockey.
>
> .... As executive director of the NHLPA, Eagleson speaks for all 480 of the league's players on all manner of issues: their insurance coverage, pension plan, licensing contracts, individual grievances against clubs and, most important, collective bargaining agreement with the NHL. When a new NHLPA-NHL contract is worked out--with never more than a lovers' quarrel cropping up, quite unlike recent negotiations in pro football, baseball and basketball-- Eagleson

> immediately becomes an agent for the partnership of players and owners in international hockey and joins forces with Hockey Canada to arrange such competitions as the six-nation Canada Cup tournament, which grossed $6 million in 1981 and will be staged again this September.

(Daly Aff., Ex. B. at 62.)

The article reported "a number of instances in which Eagleson appears to have used his position for his own or his friends' personal gain." (Id. at 66.) In addition to evidence of a pattern of self-dealing in his representation and financial counseling of individual player-clients, the article reported that Eagleson apparently enriched himself in administering international hockey and players' disability insurance funds.

The article quoted at length a sports insurance broker to the effect that Eagleson extorted personal benefits, such as insurance policies for himself and his family and sham fees for his law firm, in exchange for placing disability insurance with the broker. Another broker suggested he was subject to similar demands. Two former players, Bob Dailey and Glen Sharpley, claimed Eagleson had demanded improper fees from them to collect on their union and NHL disability insurance policies. Both were apparently charged for the expenses of an insurance executive who flew to the U.S. from London to discuss their insurance matters, yet the executive. Bernard Warren, maintained that his firm had paid for his expenses. (Id. at 66-69)

As to international hockey, the article alluded to a possible collusive link between Eagleson's control of the tournaments and his representation of the players in bargaining with the NHL as follows:

> [U]nlike their football, baseball and basketball

counterparts, hockey players have never seriously threatened to strike. They've never held out for full free agency. And though their average salary has risen from $60,000 to $130,000 in the last decade, the increase over that period is markedly less than those in baseball (up more than $250,000) and basketball (up $160,000). Even the NFL average has risen nearly $100,000.

"A joke" on the players is what Toronto Maple Leafs president and managing director Harold Ballard called the 1982 collective bargaining agreement between the NHL and the NHLPA. Gus Badali, a Toronto-based agent whose clients include Wayne Gretzky and some 30 other NHL players, says "a couple" of NHL general managers have told him point-black that the current collective bargaining agreement is the best ever--for management. "They certainly don't hide their glee," says Badali. Certainly Ballard doesn't. "How do the owners feel about Eagleson?" he says. "We like him.... Sure, it's a great contract-- for us." Yet Chicago Black Hawks president William Wirtz says he believes the contract was a good one for the players, as well as the owners. Wirtz adds. "I think Alan is a brilliant negotiator."

Eagleson is peevish when asked to explain why NHLPA contacts seem to fall short of those in other sports, particularly in the area of free agency, which, in hockey, essentially does not exist. He insists that hockey's collective bargaining agreements measure up. He also points to the precarious financial conditions of several NHL teams and the lack of a major U.S. television contract to justify what might appear as soft-pedaling at the bargaining table. "My job is to preserve jobs for as many players as I can at as high a level of salary as I can," says Eagleson.

But to one general manager, Eagleson's reluctance to

> play hardball is strictly a matter of quid pro quo. 'Al delivers us the players,' he says, 'and we give him international hockey. It's that simple.' And international hockey is the cash cow of the sport.....
>
> "It was truly patriotism that got Eagleson in [to organizing international hockey events]," says Doug Fisher, a Hockey Canada board member at the time. "That plus cupidity, position, influence. Alan wanted to run the show like a political machine. It was only when the numbers started coming in that he began to see the dollar signs."

(Id. at 64-66, alteration added.)

The article disclosed that business entities nominally under the control of a close Eagleson associate. Arthur Harnett, had bought or brokered television and advertising rights to Canada Cups and other international tournaments since 1972; public records showed that in 1976 one of these businesses had earned over $1 million in commissions brokering serial sales of Canada Cup television advertising rights. Advertising rights had been sold outright to a Harnett company for the 1981 Canada Cup. Three persons who had done business with Harnett and Eagleson claimed that Harnett, whose businesses were incorporated by Eagleson, was actually under Eagleson's complete control. (Eagleson insisted that his relationship with Harnett was "limited to that of 'solicitor [lawyer] and adviser and friend.' ") (Id. at 71, alteration in original.)

The article also disclosed examples of how Eagleson, as he himself admitted, "lent" employees of his private agency businesses to Hockey Canada for international tourney duties at rates far exceeding the salaries he paid them, thus allowing him to subsidize their work for his private companies with international hockey funds, and hinted that he might be

accomplishing the same trick with regard to his private businesses' office expenses. (Id. at 71-72.) [FN11]

> FN11. "For example, until the time he left Eagleson in1980 ... [Sports Management employee Bill] Watters was doing, by his own estimate, 85% of all contract negotiations for Eagleson's hockey clients. For that, Eagleson paid Watters an annual salary of around $45.000. In '77 and ' 78. Watters was also paid a total of $107,500 by Hockey Canada for additional duties such as coordinating the '77 World Junior Tournament and acting as general manage for Team Canada in the '77 and '78 world championships. As far as Eagleson was concerned, the money Watters got from Hockey Canada meant that he 'was paid for two years.' Therefore, Watters received no salary directly from Eagleson for '77 and '78, but he did get the $107,500 from Hockey Canada. "Eagleson had similar arrangements with other employees he lent to Hockey Canada, including Goldblatt and Curran, collecting on their services much the same way he collected for telephones, office machines and secretarial services he lent Hockey Canada. In 1976, for instance, he submitted to Hockey Canada an expense statement for $83,281 labeled 'office and general' expenses."
> Id.

2.

Beginning in late 1988, plaintiffs allege, agents of some hockey players began seeking information about the finances of international hockey tournaments. [FN12] In November 1988, they "issued a 'Position Paper' to the public in which, inter alia, they questioned Eagleson's conflicts as union leader and player agent as well as his role in international hockey," contended that

it was his fiduciary duty to disclose information on the tournaments' finances, and asserted that "[a]udited information should have been prepared regarding all monies received by Mr. Eagleson directly, or indirectly, in relation to his efforts in organizing the international hockey events." (Comp.¶¶ 79-80.) About the same time, Ed Garvey, one of plaintiffs' counsel in this action, began an investigation of Eagleson and the union's affairs at the request of a "substantial number of members of the plaintiff class." (Comp.¶ 82.) Garvey and other investigators unsuccessfully sought financial information about international hockey and the union from Eagleson, the union, the NHL, Hockey Canada, and the Canadian government. (Comp.¶¶ 79, 82, 84, 86.)

> FN12. Plaintiffs do not disclose which players these agents represented or whether it was the Sports Illustrated charges or other information that gave rise to their concern.

Nonetheless, in June 1989 Garvey released a "Confidential Report to NHLPA Members" purporting to reflect information gathered by him and player agents Rich Winter and Ron Salcer "on 17 team visits, countless phone calls to players, and years of experience as a Players Association executive and over 15 years of experience as player agents in hockey," as well as information provided by other player agents and Canadian attorneys. (Daly Aff., Ex. A. at 1.) The report also cited the 1984 Sports Illustrated article several times and recommended that all players read it. [FN13] Garvey leveled numerous charges against Eagleson for apparent self-dealing and deficient representation of the players. His report detailed inadequacies in the collective bargaining agreements, cited numerous instances in which Eagleson had made concessions for no apparent gains in return and without attempting to marshal the players' leverage, and lambasted Eagleson for achieving so little over the years

compared with what had been achieved by players' unions in other sports and what union officials had expressed as their bargaining goals. Dwelling at length on the contrast between Eagleson's apparent unpreparedness, ineffectiveness, and lack of ambition at the collective bargaining table and his demonstrated ability to be a well-prepared, ambitious, and successful bargainer when it came to his own contract with the union, the clear thrust of the report was that Eagleson's inadequacies at the bargaining table were not merely a matter of incompetence. (See especially id. at 9-17, 23-33, 40-42.)

> FN13. A section of the report entitled "The Conflicts of Interest" stated:
> Four years ago, Sports Illustrated wrote a tough article about Alan Eagleson. Alan told me that he threatened them with a libel action and spent considerable money fighting SI. He suggested he would do the same to me. From the other side, apparently SI dropped a number of items that would have been published had Alan notthreatened legal action. Whatever the facts may be, it was a story that raised so many serious questions about the activities of Alan that you should read it again. We have enclosed a copy. When Newsday reporter Jim Smith interviewed Alan, he said that Eagleson had his attorney present and that he taped the entire conversation.One theme is constant. Alan Eagleson has serious conflicts of interest. To his credit, he does not hide many of the conflicts although he rarely discusses how the conflicts might interfere with his position as executive director of the Association.... He dismisses the conflicts by saying, "if you tell people about the conflicts, there is no problem". Apparently, he believes that disclosure is all that is required. I know of very few people who agree with that statement, but we should ask whether he has, in fact "disclosed" all his conflicts and

"explained" the impact of those conflicts on you and future members of the NHLPA. Id. at 44.

Among the conflicts of interest with which the report took issue was Eagleson's simultaneous control over international hockey and collective bargaining negotiations with the NHL:

> International Hockey vs. NHLPA Interests: A general manager was quoted by SI as follows: 'Al delivers us the players and we give him international hockey. It's that simple.' Harold Ballard called the 1982 collective bargaining agreement 'a joke on the players.' Alan wants to head international hockey. He can only do so if the NHL owners and Ziegler agree. Therefore, he must not do things at the bargaining table to antagonize them too much or they will dump him--simple as that. Again, Trottier's agent commented on Alan's conflict: 'They can take international hockey away from Alan so they have him where they want him and that isn't right.'

(Id. at 51, emphases in original.)

The report also strongly criticized Eagleson for failing to provide information to the players. It asserted that players had "virtually no ability to get detailed information about the operations of their union, their pension, International Hockey, decision making in the NHL, salaries, the economics of the NHL or any other important matter impacting on their careers," and that Eagleson had refused to provide "information that is required by law to be made available to all union members." (Id. at 2.) [FN14]

> FN14. With respect to information on international hockey, Garvey reported that Eagleson was paid a

> $25,000 bonus under his contract with the union for each international Soviet tour or Canada Cup from which the union gained $600,000 or more, and stated: The $25,000 Alan received from the NHLPA for international hockey may be the tip of the iceberg. We have asked Hockey Canada to tell us how much money goes to Alan, his law firm, holding companies he controls, family members or other legal entities. The result of our investigation is a big goose egg. The Hockey Canada spokesman ... told me: 'We cannot tell you how much money went to Eagleson without Alan's permission, but he has the information if he wants to share it with you. Otherwise, we must await permission from the Hockey Canada Board to give you an accounting....'
> And the man with the information, Alan Eagleson, won't give us an answer. While he has always maintained that he 'doesn't take a dime from international hockey', former employees dispute that and now he admits that Hockey Canada pays some 'overhead'. How much overhead? He won't say. Does he get money from promoting Intl. Hockey; from rink-board advertising as one player assured us he does?
> Id. at 14-15 (emphasis in original).

In response to the Garvey report and other public criticism of his leadership, [FN15] Eagleson sent several memos and newsletters to all players asserting that he had never received benefits from international hockey, direct or indirect; that Hockey Canada's tournament records were audited and approved by independent accountants; and that financial statements were available. (Comp.¶ 81, 83, 95, 98-99.) At the same meeting of player representatives on June 3, 1989 at which Garvey presented his report, Eagleson saved himself from being fired by promising he would relinquish control of international hockey, find a successor to whom he would shortly turn over control of

the union, and release financial records and his own tax returns. By manipulating a subsequent player representatives meeting he was able to hold onto his job (through the end of 1991) and international hockey, and never did release the promised financial information. In fact, he steadfastly refused to release any financial documentation or audit reports to the player representatives, Garvey or others, such as plaintiff Forbes, who sought to obtain them. (Comp. ¶¶ 90-93, 100; Pls. B. at 40-41)

> FN15. The imbroglio in 1989 between Eagleson and Garvey, Winter, and Salcer apparently received significant media coverage in Canada and the U.S. See, e.g., Pl. Ex. 39-40, 44.

Plaintiff Forbes nonetheless continued to seek information on both international hockey and the players' pension fund throughout 1990 and early 1991. In response to his efforts and others', Eagleson sent letters and memoranda to the player representatives and to all retired players denying the allegations Sports Illustrated, Garvey, and Rich Winter had leveled at him and representing that audits had cleared him of any improprieties. (Comp. ¶¶ 102- 03; see also Forbes Aff. ¶ 5, Ex. A.) In addition to these misrepresentations and continued refusals to disclose financial information, plaintiffs allege, "Eagleson and representatives of the Member Clubs repeatedly misled members of the class [of hockey players] by asserting that allegations that players had received less than adequate benefits over the years were not true," while Eagleson "made numerous other statements to the players, purporting to document why concerns raised by Garvey and others were not accurate or well founded." (Comp.¶¶ 118-20.) In May 1991, Forbes ceased his seemingly futile quest for financial documentation.

In June 1991, Rich Winter, a contributor to the Garvey report, filed a complaint with the Alberta Labor Board on behalf of two Edmonton Oilers seeking to void the NHLPA-NHL collective bargaining agreement. The complaint alleged that the union was dominated by the NHL as the result of an arrangement between Eagleson and the NHL and certain Member Clubs and officials and leveled a host of charges of collusion between Eagleson and the NHL, centered in large part on the NHL's acquiescence in Eagleson's use of international hockey to enrich himself and his family and associates. (Cardozo Aff., Ex. A at ¶¶ 36-43, 44(n), 46, 47(h), (l).) In support of its claims the complaint cited only the 1984 Sports Illustrated story. [FN16]

> FN16. The complaint said this of the Sports Illustrated article:
> [¶ 15] The article described numerous examples of the close association of R. Alan Eagleson ... with the NHL, its member clubs, and owners, officers, and employees of the NHL's member clubs including, but not limited to, the following:
> a. Eagleson acting as agent for the partnership between the NHL and the NHLPA in international hockey;
> b. The arrangement between the NHL and Eagleson pursuant to which Eagleson delivers the players to the NHL under the terms of a Collective Agreement more advantageous to the NHL than it would have been had Eagleson negotiated for the NHLPA in good faith in exchange for which the NHL granted Eagleson the permission he needs to run international hockey;
> c. Eagleson representing a number of NHL coaches and general managers;
> d. Eagleson's close personal relationship with NHL President, John Ziegler, and Chicago Black Hawks' owner, William Wirtz;
> e. Eagleson's impassioned plea for the NHLPA to permit

the NHL to merge with the World Hockey Association in 1979 without advising the NHLPA of the concessions the NHL was prepared to make to gain the NHLPA's agreement to the merger resulting in a deal more advantageous to the owners than it would have been had Eagleson acted in good faith and not misrepresented the NHL's financial condition to the NHLPA; and

f. Eagleson acting on behalf of a partnership that included deceased Toronto Maple Leaf owner, Harold Ballard.

16. The NHL was aware a large number of NHLPA members read the above mentioned article.

17. The NHL did not communicate with NHLPA members or call upon Mr. Eagleson to place any evidence before the NHLPA or its members contradicting any of the allegations referred to in the Sports Illustrated article leaving with NHLPA members the impression the business relationships between Eagleson and the NHL were intimate and commingled....

4.

The Tikkanen-Muni labor complaint, as well as the Garvey report and Sports Illustrated article, were among the subjects of a series of articles published September 22-26, 1991 by The Eagle-Tribune of Lawrence, Massachusetts. (Cardozo Aff., Ex. C at 2-3.) The five-part series reported the results of what was described as a nearly year-long investigation into the affairs of the NHL and NHLPA involving interviews with over 200 people, including 100 former or current players, and review of some financial records. (Id. at 1.)

The first article of the series was headlined "Big-time hockey: A study in conflicts of interest; Did union chief Alan Eagleson help the players or himself?" and "Players say conflicts

are why salaries lag." It began:

> Pro hockey's 75th anniversary season is about to begin..... But there is trouble.
>
> The season is beginning with feelings of bitterness and anger, amid lawsuits and threats of lawsuits, fueled by charges of wrongdoing by some of hockey's biggest names against its top leaders. There is talk of the league's first strike in more than 60 years over the long simmering issue of free agency.
>
> Behind the upheaval in the NHL, The Eagle-Tribune has found, are charges by players that they have been betrayed not only by the league but also by their own union's executive director, R. Alan Eagleson....

(Id. at 1-2.)

Among the series' "major findings," the initial article summarized the following:

> . The head of the players' union, Eagleson, has repeatedly placed himself in a position of conflict of interest between players and team owners, and between union and personal business. Some players and other agents charge the players have wound up the losers. Meanwhile, they contend, Eagleson has won the favor of the league and team owners and advanced his own career, becoming perhaps the most powerful man in hockey.
>
> . While representing more than 2,500 players since 1967 on teams in the United States and Canada, the players' union is not fully accountable to labor authorities in either nation.....
>
> .Eagleson became Canada's international hockey czar by obtaining the blessing of NHL owners, with whom he has bargained on behalf of the players. Eagleson also has close ties with NHL executives and some individual

owners, but maintains he has been able to remain a tough negotiator for the players....

.Hockey players, who face the most restrictive free agent rules in North American professional sports, may have lost a major chance to win free agency when they consented to a 1979 merger between the NHL and the rival World Hockey Association (WHA). As a result, according to one study, hockey salaries have slumped in relation to salaries in the three other major sports.... [FN17]

> FN17. A separate article detailed how the WHA-NHL merger appeared to have been a "done deal" worked out by Eagleson and the NHL behind the scenes, after which Eagleson manipulated the players into approving the deal without obtaining significant concessions in return. Id. at 6-7.

.Players who suffer major injuries often are denied disability insurance benefits and must fight to get a settlement. In one case, a player who suffered permanent brain damage after being slammed into the boards was denied full benefits because of a policy change that he was unaware of.

.The British broker who handled the disability insurance also co-owns a lease on an exclusive London flat with a firm headed by Eagleson. At least once, Eagleson billed players for staying in the apartment.....

.For patriotism and the pension fund, all-star hockey players take minimum pay to play for their national teams in the Canada Cup tournament and other international matches. But financial records show that because of expenses the Players Association gets less than 10 percent of the income. The records have been available to the NHL but unavailable to the Players

Association, even though the two are supposed to be partners in Canada Cup tournaments.... [FN18]

FN18. Other "major findings" of the series pertinent to plaintiffs' claims are these (id. at 1-3):
.Union funds were loaned to clients of Eagleson under what some experts say were favorable terms for the borrowers.
.As head of the union, Eagleson moved its headquarters to a building purchased shortly before the move by an Eagleson family trust. While he has said the move saved money, financial records indicate otherwise. .Hockey club owners were able to use millions of dollars in surplus money to offset their mandated contributions to the player pension fund. That happened after the Players' Association agreed to the removal of player representatives from the pension board and the board changed the rules. The move was negotiated by Eagleson on behalf of the players. Hall of Fame players have gone to court over the pension issue. The owners, who say the money is an insurance company refund that belongs to them, have fired back with threats of libel suits.
.Millions of dollars more in pension reserves that retired players claim was theirs was used by the owners, with approval of the players' union, to pay for a new "security" package for current players in 1986 after the players began pressing for free agency....
.A portion of the profits earned by the players from international hockey goes into the pension fund. But, contrary to the impression of many players, the contributions do nothing to increase their NHL pensions. Instead, they offset contributions that the owners would have to make otherwise. Owners, meanwhile, get an equal cut of Canada Cup proceeds.....

(Id. at 1-3.)

As to the conflict of interest presented by Eagleson's control of international hockey, one article stated:

> Eagleson's biggest conflict, according to critics, stems from his maintaining personal and professional ties to NHL bosses while also representing players as their union's executive director.....
>
> Eagleson is also linked to NHL owners and executives through international hockey.... Eagleson needed NHL approval to use NHL players in that [first Canada Cup] match and all that he has organized since then. Critics say that makes Eagleson beholden to the same people he has bargained with on behalf of players.
>
> One unnamed hockey general manager was quoted as saying in the 1984 Sports Illustrated article: "Al delivers us the players and we give him international hockey."
>
> "You and Ziegler have become co-commissioners or co-presidents of international hockey as well as the NHL," Ed Garvey, a U.S. labor lawyer retained by a group of players wrote to Eagleson in 1989. "You have moved into a conflict position that is so deep it would be nearly impossible to untangle you, your relationship with Ziegler and Wirtz, your involvement with International Hockey and your supposed role as leader of the union."

(Id. at 10, some indentations omitted.)

Much as Sports Illustrated had seven years before, the article went on to report how, despite his disclaimers to the contrary, Eagleson and his associates profited from the tournaments. Eagleson rented out his private employees for

international tournament work at rates exceeding what he paid them, essentially allowing him to subsidize his own employees with international tourney funds and sometimes even make a premium on top. [FN19] In addition, Hockey Canada records showed that companies of Eagleson associate Arthur Harnett had brokered tournament advertising rights for the 1972, 1976, and 1981 Canada Cups, making hundreds of thousands of dollars in commissions. Two of these companies had been created by Eagleson, the report noted, while the directors of another included Eagleson's wife, his law partner, and his accountant. Overall, the report said, the three Canada Cups in the 1980's generated over $24 million in income, of which 75% went to pay operating expenses. (Id. at 9-10.)

> FN19. The article reported the following two scenarios: A firm headed by Eagleson himself collected money by "renting" Eagleson employees to Hockey Canada for international events, according to two former employees. As international hockey chairman, Eagleson got to choose employees for international events, from accountants to coaches and players. Rick Curran was one... he went to work in 1977 for Eagleson's Sports Management Ltd. Curran said he was told "I would be paid a salary of $12.500 for that year with a chance to earn a bonus of $2,500." Soon after taking the job, Curran was also offered a job through Eagleson as road secretary for a Hockey Canada team headed to the world tournament in Austria. Curran said his six-month Hockey Canada contract "specified I was to be paid a salary of $15,000. I thought this was a great deal...." He said he did not find out there was a catch until after the tour was over and he got his check from Hockey Canada. "It was then that I was to learn that I was giving the check back," Curran said.... The arrangement between Eagleson and Curran was confirmed by Bill Watters, who ran

> Eagleson's Sports Management business and also worked for Hockey Canada. "The transaction was very simple. Rickey was being paid $12,500 on an annual basis from Alan Eagleson. Hockey Canada, I believe, was paying him $25,000. Rickey would get his check, give it back, Al would pay him what he was entitled to and take the rest."
> Watters' own situation was slightly different. He said he was allowed to keep his Hockey Canada pay, but Eagleson held back his Sports Management pay. The bottom line, he said, was that "international hockey was paying me not only to administer the tournaments and their responsibilities but Eagleson's company as well." ... Eagleson defended the practice in the 1984 Sports Illustrated article: "If I pay my guy 30 and rent him out for 50, that makes me smart."
> (Id. at 10, some indentations omitted.)

The article also noted that the NHL knew of Eagleson's conflicts of interests, but had endorsed his claim that "A conflict is only improper if it's not announced." "Along with most hockey players," the report stated, "the league has long overlooked or tolerated Eagleson's conflicts of interest." (Id. at 8, describing interview with NHL President John Ziegler).

5.

In response to an Order, issued after the parties had filed two rounds of briefing on the instant motion, in which I noted "suggestions in plaintiffs' briefs that they have refrained from supplying certain evidence that they did not have notice of their claims before November 1991 ..." and observed that "[n]o discovery is required for plaintiffs to present evidence of what they did or did not know about their claims" (Order dated June 26, 1998), the five individual plaintiffs in this case submitted

affidavits concerning their knowledge of their claims. As to their knowledge prior to November 1991 of the various publications described above, they state as follows.

David S. Forbes

Forbes was an NHL player and NHLPA member from 1973 to 1978 and a WHA player in 1978-1979. He learned of and read the Garvey report for the first time in 1990. He states he has never read the Sports Illustrated article. As with other retired and current players, however, he received correspondence from Eagleson in late 1990 in which Eagleson referred to the Sports Illustrated allegations in the course of defending himself against charges Rich Winter had leveled at him in more memoranda to retired players. (Forbes Aff. ¶ 5, Ex. A (Memo from Alan Eagleson to All Members of the NHLPA Executive Committee and Player Representatives regarding "Rich Winter/Retired Players," December 10, 1990)). In one such memo to the union's then-deputy chief, Bob Goodenow, Winter sought information about and demanded the union investigate, inter alia, Sports Illustrated charges that Eagleson had pocketed money paid by international hockey for the services of his employees, maintained questionable financial ties to Arthur Harnett's companies, and charged illegitimate fees to players seeking disability insurance. (Id., Ex. A (Winter letter dated November 2, 1990 at ¶¶ 8-20).)

From 1990 through 1991, Forbes persistently sought financial documentation from Eagleson, the NHLPA, the NHL, and Hockey Canada on international hockey, among other things. All consistently refused him any such documentation. All he obtained from Eagleson were representations that the international hockey venture was conducted in accordance with proper accounting and reporting methods and audited by a major

accounting firm. In the spring or summer of 1991 Forbes learned that the FBI was investigating Eagleson. In 1992 Forbes received and read The Eagle-Tribune series; from those articles he first learned of Tikkanen-Muni labor complaint filed in 1991.

Richard D. Middleton

Middleton played in the NHL and was a NHLPA member from 1974 to 1988. In late September or early October 1991 he read The Eagle-Tribune articles. From these articles he learned of the Sports Illustrated article and Garvey report, but has never read either. He learned in "late 1991 or early 1992" that the U.S. government had begun investigating Eagleson.

Ulf Nilsson

Nilsson played in the NHL and was a member of the union from 1978 to 1983. He avers that he has "a vague memory of having been told by another person that an article had been published in Sports Illustrated about Eagleson and the fact that there were allegations in the article concerning Eagleson's wearing many different hats, resulting in possible conflicts of interests." However, he never read the article. Only since 1995 has he learned of the Garvey report and The Eagle-Tribune articles.

D. Bradford Park

Park played for NHL clubs and was a member of the NHLPA from 1968 to 1985; he was a vice president of the NHLPA from 1972 to mid-1983. In 1989 he learned that Ed Garvey "had been attempting to investigate Eagleson's operation of the NHLPA and had issued an opinion of some type to the player representatives of the NHLPA." He never received a copy of or read the report. In September 1991 he read The

Eagle-Tribune articles. (He thereby first learned of the Sports Illustrated article, but has never read it.)

Douglas D. Smail

Smail played for NHL teams and was a member of the NHLPA from 1980 to 1993. He avers that he learned in 1989 that "Ed Garvey and some players were attempting to investigate the manner in which Eagleson was running the NHLPA," but to the best of his knowledge did not receive a copy of the report. He was unaware until 1995 of either the Sports Illustrated or The Eagle-Tribune articles.

In addition to these statements, each plaintiff states generally he did not and could not have known that Eagleson was illegitimately skimming profits from international hockey and taking bribes from the NHL defendants prior to the 1994 indictment. [FN20] Specifically, each contends he learned for the first time from the indictment that Eagleson was (1) secretly receiving money from the sale of advertising rights by the companies of Arthur Harnett, Irvin Ungerman, and other associates; (2) appropriating air travel passes given by Air Canada as payment for advertising rights; and (3) charging international hockey for excessive, illegitimate out-of-pocket expenses. [FN21]

> FN20. See Second Superseding Indictment, attached to plaintiffs' RICO Case Statement. In October 1997, Eagleson plead guilty to three counts of mail fraud associated with three schemes in which he (1) sold advertising rights for the Canada Cup and other international tournaments for money and Air Canada travel passes which he kept for himself and his associates without the knowledge of the union, the NHL, or Hockey Canada; (2) defrauded the NHLPA by charging it for

illegitimate expenses and in-kind benefits and falsely representing to union members that all union expenses were in order; and (3) defrauded a client, player Glen Sharpley, by charging him for the travel expenses of insurance executive Bernard Warren. (Daly Aff., Ex. D.)

FN21. The carefully worded statements in the affidavits raise questions as to whether plaintiffs really mean to suggest they did not know of facts suggesting Eagleson was making excessive, unnecessary charges to international hockey for his personal benefit. (See, e.g., Middleton Aff. ¶ 10: "I never knew that Eagleson was reimbursed from the international tournaments for out-of-pocket expenses in amounts which the U.S. government had concluded were excessive, unnecessary and unreasonable.")

With the exception of Forbes and Park (who inquired of the author of The Eagle-Tribune series and found out Eagleson was being investigated by the U.S. government), plaintiffs do not state whether they inquired into general allegations that Eagleson had serious conflicts of interest that might have lead him to betray the players' interest. [FN22] None of the plaintiffs states whether he was aware of specific allegations that Eagleson had charged illegitimate fees or derived other benefits from his control of disability insurance, subsidized his private businesses' expenses with international tournament money, or directed control over tourney advertising rights to close business associates.

FN22. Plaintiffs provide no evidence as to whether Garvey or Rich Winter or anyone else was acting on their behalf in investigating Eagleson's conduct. They seem to use Garvey's investigation both ways-- implicitly

alleging and arguing that his investigatory efforts fulfilled their duty of reasonably diligent inquiry, yet denying contemporaneous knowledge of his efforts or even (except for Forbes) any knowledge of his report's contents. I think it clear that if Garvey's inquiries are to be imputed to plaintiffs for purposes of establishing their diligence, then so must knowledge of the results of his investigation or, vice versa, if his knowledge is not to be imputed to plaintiffs, then neither are his investigative efforts. However, the relationship between Garvey and plaintiffs is ultimately not determinative of the timeliness of plaintiffs' claims; the result is the same even if plaintiffs are allowed to have it both ways.

III.

Plaintiffs argue they were stymied from learning all the facts essential to their claim despite more than reasonably diligent attempts to do so because defendants failed to disclose and misrepresented financial documentation that would have informed plaintiffs of their claim. This argument is premised on plaintiffs' contention that the publications described above did not provide notice of all the facts necessary to bring this action, and therefore could not have provided plaintiffs with either actual or constructive notice of their claim.

I disagree, and find as a matter of law that plaintiffs' claims accrued prior to November 7, 1991.

A.

First, there can be no doubt that plaintiffs had reason to inquire into possible wrongdoing by defendants--that is, had inquiry notice of their claim. Plaintiffs appear to concede as

much (see Pls.' Surreply B. at 3-4) and obviously could not maintain they had no inquiry notice of their claims yet diligently sought to uncover them. [FN23]

> FN23. From supplemental briefs on the significance of the Klehr decision filed last year through the first two rounds of briefing on the instant motion for summary judgment, plaintiffs maintained the information available to them prior to 1994 was simply insufficient to give them notice of their cause of action; only when the Court expressly informed plaintiffs they would be expected to present evidence as to their own knowledge of their claims did they submit affidavits apparently attempting to throw doubt on their awareness of allegations such as those leveled by Sports Illustrated and Garvey. Compare J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1256-57 (1st Cir.1996) ("Guided by the principle that when reviewing motions for summary judgment, courts should 'pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required,' ... we view with significant skepticism what appears to be a last ditch effort to create a disputed fact where none exists.") (citations omitted); Seawell v. Miller Brewing Co., 576 F.Supp. 424, 429 (M.D.N.C.1983) (Ervin, J.) (general averments of ignorance in the face of evidence of widespread publication of issues of interest to plaintiffs insufficient to save plaintiffs' claims from statute of limitations bar).

Plaintiffs' affidavits show that each either read or was aware of the Sports Illustrated, Eagle-Tribune, or Garvey report prior to November 7, 1991. Forbes read the Garvey report in 1990, and both the Garvey report and subsequent correspondence among Forbes, Eagleson, and Rich Winter referred in a specific

manner to Sports Illustrated allegations. Middleton read The Eagle- Tribune series in September or October 1991, and from them learned of the Garvey and Sports Illustrated reports. Park learned in 1989 of Garvey's investigation of Eagleson and that a report had been issued, and in September 1991 read The Eagle-Tribune series. Smail knew in 1989 of Garvey's investigation. Nilsson reports having "a vague memory" of being told about the Sports Illustrated story and that it contained allegations that Eagleson had "possible conflicts of interest."

Moreover, plaintiffs have alleged that in November 1988 some player agents issued a paper "to the public" questioning Eagleson's conflicts of interest, inter alia, as head of international hockey; that between 1989 and early 1991 Eagleson sent mailings to all players--current and retired--specifically referring to and defending himself against the allegations of Sports Illustrated, Garvey, and Rich Winter (see also Forbes Aff. ¶ 5, Ex. A; Park Aff. ¶ 9; Smail Aff. ¶ 6); and that during the same period Eagleson made "numerous other statements to the players, purporting to document why concerns raised by Garvey and others were not accurate or well founded."

Thus, by early 1991 at the latest all plaintiffs knew or should have known of allegations that Eagleson had serious conflicts of interest and inadequately represented the players, and all either had learned of or, in the exercise of reasonable diligence, should have inquired into the allegations in the Garvey and Sports Illustrated reports. In addition, by October 1991 Middleton and Park had read The Eagle-Tribune articles.

B.

Even the most cursory of perusals of any one of these three publications would have revealed to plaintiffs the gist of their claim: Eagleson was enriching himself by means of

international hockey and the disability insurance and the NHL defendants knew so but apparently took no action to remove those opportunities from him. Moreover, examination of either the Sports Illustrated or The Eagle-Tribune article would have revealed almost every detail of the schemes plaintiffs now allege in their complaint, as well as sources to whom they could have gone for verification or further information. From them, plaintiffs learned or should have learned the following facts (as discussed below, plaintiffs contest in any significant way only their notice of the third fact listed below):

1. Eagleson controlled international hockey on behalf of the NHL-NHLPA joint venture and Hockey Canada. He controlled the organization, administration, expenses, and revenues of the tournaments.

2. Eagleson was indisputably benefitting himself and his associates from international hockey. For example, Eagleson admitted that he lent his employees to international hockey at higher rates than he paid them and pocketed the difference, and that he gave control of the sale of advertising rights to businesses headed by his close associate and client, Arthur Harnett.

3. Eagleson was possibly benefitting himself and his associates from international hockey in other ways he did not admit. For example, he might have controlled the Harnett companies to whom he gave tournament advertising rights and directly benefitted from their sales, and he might have subsidized his private businesses' office expenses by charging excessive amounts to international hockey just as he subsidized the salaries of his employees.

4. Eagleson's control over international hockey and its finances was not possible without the assent of the NHL defendants, who agreed to permit their players to play in the tournaments and

agreed to Eagleson's leadership of the NHL-NHLPA partnership.

5. The NHL defendants knew or should have known, if only from the same public allegations of which plaintiffs were aware, of charges that Eagleson's control over international hockey was a conflict of interest and, more specifically, that Eagleson was enriching himself and his associates by means of international hockey. They nonetheless continued to permit their players to play in the tournaments and to allow Eagleson to run them without making any apparent move to police or otherwise constrain Eagleson's conduct.

6. Eagleson may have extorted personal benefits from brokers for placing disability insurance with them and may have charged players illegitimate fees for helping them get paid off on their union and NHL policies.

7. The NHL and Member Clubs allowed Eagleson to place their insurance funds despite notice of charges that he had leveraged this power for his personal benefit.

These facts were more than sufficient to provide plaintiffs with notice that the NHL defendants might be turning a blind eye to Eagleson's use of international hockey and NHL disability insurance funds to enrich himself, and thus with notice of a claim that both the NHL defendants and Eagleson were continuously violating § 302 of LMRA. [FN24] Indeed, on the basis of these facts plaintiffs could have actually plead almost every allegation in their complaint concerning defendants' alleged § 302 violations. That they may not have recognized that these facts added up to unlawful bribes is irrelevant. [FN25] Keystone, 863 F.2d at 1128.

FN24. The complaint alleges that the NHL defendants paid or delivered "money or other thing of value" to

Eagleson in violation of § 302(a) when they [¶ 46] ... granted Eagleson unsupervised control of the joint ventures which participated in the Canada Cup and other international tournaments and unsupervised control of funds generated by such tournaments belonging to the NHL and the Member Clubs, together with these defendants' knowledge of Eagleson's improprieties or their failure to hold Eagleson accountable as set forth in Paragraph 44 ... [¶ 47].... permit[ted] Eagleson to control the expenditure of NHL and Member Club funds to purchase disability insurance, as set forth in Paragraph 43, above ...

[¶ 49].... permit[ted] NHLPA players to participate in the Canada Cup and other international tournaments and ... place[d] Eagleson in unsupervised control of the joint ventures which participated in each tournament and the revenue generated therefrom, and [failed] to hold Eagleson accountable for the revenues generated from each such tournament, thereby allowing Eagleson to profit therefrom, from at least 1976 through early 1992 ...

Eagleson allegedly received or accepted "money or other thing of value" in violation of § 302(b) each time he [¶48] ... accept[ed] his position of domination and control over the joint ventures which participated in the Canada Cup and other international tournaments, and ... personally profit[ted] from the revenues from these international tournaments, as set forth above, and ... accept[ed] control over the purchase of disability insurance.

FN25. In their affidavits, plaintiffs deny they knew or could have known of two of Eagleson's self-enriching schemes (discussed supra part C) but are conspicuously silent as to their awareness of other specific charges that

> Eagleson was benefitting himself, his family, and his associates from his control over international hockey and disability insurance. The affidavits rest largely on conclusory statements that plaintiffs did not and could not know that Eagleson was accepting "bribes" or making profits to which he was not "legally entitled."

Plaintiffs also knew or should have known of their alleged injuries. Each of the inadequacies in the Eagleson-negotiated collective bargaining agreements alleged in plaintiffs' complaint (see Comp. ¶ 51) were detailed in the Garvey report and most were also discussed in the Sports Illustrated and The Eagle- Tribune articles. Plaintiffs cannot seriously argue that players were unaware of their injuries as alleged in this action.

C.

In contending that they lacked actual or constructive notice of their claim prior to Eagleson's indictment in 1994, plaintiffs do not argue that they were unaware of facts showing the alleged "pattern" element of their cause of action and do not seriously argue they were unaware of their possible injuries. Rather, plaintiffs' arguments center on their notice of defendants' alleged predicate acts--the § 302 violations. They contend that no matter how carefully examined the information available to them did not give notice of two facts essential to recognizing that defendants' conduct constituted such violations: that (1) the revenues Eagleson appropriated from international hockey tournaments were "illegitimate"; and (2) a portion of those revenues rightfully belonged to the NHL defendants.

1.

Plaintiffs argue that the payments Eagleson received from international hockey appeared to be within the exceptions of § 302(c) of LMRA, which makes certain payments from an employer to an employee representative lawful. They contend that while it was known that Eagleson organized the international tournaments on behalf of the players, owners, and Hockey Canada, "[i]t appeared to any observer, including the players, that Eagleson was legitimately paid for his time and/or reimbursed for his out-of-pocket expenses incurred in running the tournaments. On their face, such payments would not violate § 302." (Pl. B. at 19.)

I disagree. No reasonable observer could have concluded that the payments Eagleson was reported to have received were either legitimate or within the exceptions of § 302(c).

Section 302(c) provides in relevant part:

> The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to ... any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer ... (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business ....

29 U.S.C. § 186(c)(1), (3).

As to § 302(c)(1), plaintiffs have neither alleged nor argued that Eagleson was or appeared to be an "employee" or "former employee" of the NHL with regard to his international tournament organizing, and it is clear on this record that they could not do so in good faith. See 29 U.S.C. § 152(3) (excluding

independent contractors and supervisory employees from the definition of "employee" for purposes of Labor-Management Relations Act). Eagleson's reported improprieties therefore could not fit within the plain language of § 302(c)(1). Nor could such transactions reasonably have been construed as related to "the sale or purchase of an article or commodity," much less at "the prevailing market price in the regular course of business." [FN26] Accordingly, Eagleson's conduct could not reasonably have been thought lawful under § 302. See United States v. Ryan, 350 U.S. 299, 305, 76 S.Ct. 400, 100 L.Ed. 335 (1956) (Section 302 "appears to be a criminal prohibition, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative"); United States v. Lanni, 466 F.2d 1102, 1103- 1105, 1108 (3d Cir.1972) (1959 amendments to § 302 were intended to close loop holes and "stamp[ ] out 'all forms of bribery' between management and labor officials"). [FN27]

> FN26. For example, the descriptions in both Sports Illustrated and The Eagle-Tribune of how Eagleson sold advertising rights to companies nominally owned by Arthur Harnett compel the conclusion that Eagleson was using international hockey to benefit his personal associates and, further, strongly suggest that Eagleson sold (or undersold) tournament advertising rights to one or more companies he or his family controlled. See also supra note 14 (similar suggestion in Garvey report). Similarly, in reporting how Eagleson lent his private employees to international hockey at rates much greater than those he paid them, both articles made clear that (however one wanted to look at it) Eagleson was either charging exorbitant, above-market fees for his employees or was having international hockey carry part of the salary expenses for Eagleson's private business. In neither of these cases could it have reasonably been

thought that Eagleson was selling "article[s] or commoditie[s] at the prevailing market price in the regular course of business." Compare, e.g., United States v. DeBrouse, 652 F.2d 383, 386-87 (4th Cir.1981) (affirming convictions for violations of § 302 where defendant labor official accepted goods from employers with no intent to pay prevailing price for them; sought and obtained employer's agreement to make payments to a third party; and steered employer to contract for certain services with a firm which employed his son and in which he held an undisclosed ownership interest).

FN27. Without claiming so expressly, plaintiffs argue as though § 302(c) provides an exemption for "legitimate" payments to a labor representative for services just like it exempts payments for articles or commodities sold at prevailing rates in the ordinary course of business. See, e.g., Pl. B. at 16 ("The gravamen of a § [302] violation is that the union leader has received funds ... from the employer ... other than for services rendered or ... for more than the fair price of the services or commodity delivered to the employer.") If this suggestion were indeed correct, bribes could flow freely and legally through private businesses established by labor officials: labor officials could freely extort the business of employers and employers freely steer business to them. In fact, even if "legitimate" in the sense that the employer pays no more for services than others, such scenarios present obvious financial conflicts and are plainly prohibited by the statute. See, e.g., United States v. Burge, 990 F.2d 244 (6th Cir.1992) (affirming conviction of labor official for receiving payments from employer of potential union members for the "consulting" services of his private firm); United States v. Overton, 470 F.2d 761, 764-66 (2d Cir.1972) (affirming convictions of labor

officials who solicited business of employers for their private public relations services). The law provides only a narrow exception for an employer's payments to an employee as compensation for his or her work as an employee.

2.

Plaintiffs next assert that they had to know that a substantial portion of the international tournament revenues Eagleson was misappropriating rightfully belonged to the NHL defendants before they could know that the NHL defendants had violated § 302. Such could not be known, they say, until Eagleson was indicted in 1994.

This "fact," however, was and remains in no way essential to plaintiffs' claim. Plaintiffs' allegations premise liability on the theory that the NHL defendants were in violation of § 302 because they knowingly put and maintained Eagleson in a position to enrich himself. [FN28] According to plaintiffs' own theory, even if Eagleson were enriching himself only at the expense of third parties rather than with NHL funds, both he and the NHL defendants were nonetheless in violation of § 302. (See Comp. ¶¶ 44, 46-50.) [FN29]

FN28. See supra note 24.

FN29. Plaintiffs' theory appears to reflect accurately the legal insignificance of whether Eagleson was using powers given him by the NHL defendants to pilfer their funds as well as that of third parties. If he was doing either or both with the NHL defendants' acquiescence, he and they were in violation of § 302. See Haley v. Palatnik, 509 F.2d 1038, 1041 (2d Cir.1975) ("There is nothing to require that, in order to constitute a violation

of § 302(a) and (b) the moneys agreed to be paid to the union representative or official be paid from the employers' funds."); United States v. Ferrara, 458 F.2d 868, 872-73 (2d Cir.1972) (defendant labor officials obtained thing of value in violation of § 302 where employer promised to buy coffee from supplier identified by officials, and supplier made annual payments to officials); cf. United States v. Lanni, 466 F.2d 1102, 1107-09 (3d Cir.1972) (§ 302(a) and (b) express clear intention "to forbid indirect union official--management bribery"); United States v. Overton, 470 F.2d 761, 765 (2d Cir.1972) (indirect scheme of payments by employer to employee representative through non-employer corporate entities is in violation of § 302); United States v. Iozzi, 420 F.2d 512, 515 (4th Cir.1970) (same).

Moreover, plaintiffs do not explain what information available to them only after November 1991 finally lead them to learn that Eagleson must have been taking NHL money. The indictment provides no information in this regard not already apparent from the international hockey profit-sharing agreement between the NHL and the NHLPA enshrined in their collective bargaining agreements beginning in 1976. [FN30]

FN30. Pursuant to the profit-sharing agreement, the NHL and the NHLPA split revenues from the Canada Cups net of operating expenses (including Hockey Canada's $600,000 fee). As each Canada Cup reportedly generated millions of dollars in revenue, both plaintiffs and the NHL defendants therefore had at least constructive notice that any potential revenue lost or additional expenses incurred as a result of Eagleson's schemes likely reduced the net proceeds to be split by the NHL and the union. See Forbes Aff., Ex A. (Forbes' Memo to File reporting December 13, 1990 meeting with Eagleson ("I mentioned

how I had noticed in the CBA that the players' share was a function of 'net proceeds' and that he [Eagleson] knew as well as I that 'net' can be just about whatever you want it to be.")(alteration added)); id., Ex. D (letter from Forbes to Bob Goodenow dated January 4, 1991) (similar).

3.

Plaintiffs also assert that some of Eagleson's schemes remained wholly hidden and could not have been uncovered until the 1994 indictment, citing Eagleson's appropriation of thousands of dollars worth of travel passes and other in-kind benefits paid by Air Canada and other businesses in exchange for international tournament advertising rights, and his pocketing of proceeds from the sale of Canada Cup advertising rights between 1984 and 1991 by All Canada Sports Promotions, Ltd., the firm owned by a close associate, Irvin Ungerman, to which Eagleson gave control of advertising rights. (Comp.¶¶ 38-39).

Even assuming plaintiffs could not have learned of these schemes in the exercise of reasonable diligence prior to Eagleson's indictment. [FN31] the limitations period generally will not be tolled merely because plaintiffs did not know all the predicate acts encompassing the pattern of racketeering alleged in their complaint. See Davis v. Grusemeyer, 996 F.2d at 625, n. 16 ("[T]he question is not when Davis knew each and every predicate act charged in the complaint, but when he knew, or with reasonable diligence, should have known that defendants' conversion of the stolen 1985 Seville was part of a developed pattern of racketeering. (Indeed, a RICO plaintiff need not even allege each and every predicate act that is part of the pattern ...")). If plaintiffs had to know all the wrongdoing eventually alleged in their complaint before their claims even accrued, the statute of limitations would be essentially meaningless. [FN32]

FN31. While it appears that neither of these schemes was fully illuminated until Eagleson's indictment, there was information sufficient to constitute inquiry notice of them. Sports Illustrated reported: "Eagleson also says he receives 'an unlimited' number of passes from Air Canada for the business he does with them. Once again, where Eagleson's personal business ends and his representation of hockey players begins is blurred. The only things that are clear are that Eagleson receives many free passes, and he decides who gets to use them." While this statement does not suggest one way or the other that the passes were linked to Canada Cup advertising rights sales, in combination with other questionable transactions detailed in the article it should have raised sufficient suspicion to require investigation.
Similarly, reports in both Sports Illustrated and The Eagle-Tribune that Eagleson had made a practice since 1972 of giving control of tournament advertising rights to a close business associate who was possibly little more than his agent should have prompted inquiry into his practices in subsequent tournaments. Cf. Davis, 996 F.2d at 625 (plaintiff caught in sting operation in which law enforcement officials ran "chop shop" for stolen cars could not reasonably have believed he was the shop's only customer and failure to investigate possible pattern of officials' alleged wrongdoing was inconsistent with reasonable diligence). There is no evidence plaintiffs ever investigated either Eagleson's receipt of travel passes or his control of tournament advertising.

FN32. Indeed, according to plaintiffs much about Eagleson's subterfuge did not come to light until hearings in January 1998 in which Eagleson plead guilty to Canadian charges illuminated how he had funneled international tourney money through businesses

nominally owned by others to himself, his law firm, and businesses controlled by his family. (See Pls. B. at 27.) Since these hearings were held several years after the filing of the complaint in this action, plaintiffs cannot be heard to argue that such details were necessary to pleading this action.

This general rule is soundly applied here. The gravamen of plaintiffs' claim is a collusive arrangement between Eagleson and the NHL defendants that resulted in collective bargaining agreements disadvantageous to the players. Knowing every way in which Eagleson used international hockey to enrich himself was unnecessary for plaintiffs to have notice that defendants had maintained such an arrangement in continuous violation of § 302. In fact, even without the benefit of further investigation during the limitations period, plaintiffs could have plead all but two of their allegations concerning Eagleson's self-enriching schemes--neither of them essential to their claim (see Comp. ¶¶ 38-39)--based on the charges in Sports Illustrated or The Eagle-Tribune alone. (See Comp. ¶¶ 36-44.) [FN33]

FN33. The complaint summarizes plaintiffs' § 302 allegations as follows:
44. At all times relevant hereto, up to and including the present date, [the NHL defendants] knew that Eagleson was utilizing his position of control over the purchase of disability insurance and control over the Canada Cup and other international tournaments to enrich himself, in part, with funds otherwise belonging to the NHL and its Member Clubs, as described in Paragraphs 37 through 43 above or, in the alternative, [the NHL defendants] knowingly failed to hold Eagleson accountable for the proceeds of the Canada Cup and other international tournaments and the purchase of disability insurance, which failure continued even after said defendants were

put on notice that Eagleson likely was enriching himself: (a) from the use of NHL and Member Club funds to purchase disability insurance; (b) from Canada Cup and other international tournament revenues, by, at a minimum, causing Hockey Canada to reimburse Eagleson- owned companies for the use of those companies' employees at rates higher than Eagleson was paying them; (c) by profiting from the sale of television rights to international tournaments; and (d) by receiving benefits from insurance brokers. Further, these defendants knew that Eagleson would not have had the opportunity to engage in such profit making schemes had they not agreed to place him in control of the purchase of disability insurance or granted him unsupervised control of the joint ventures' involvement in the Canada Cup and other international tournaments, as described above, while failing to hold him accountable for the proceeds therefrom. One or more examples of each of Eagleson's alleged schemes (a) through (d) could have been plead based on information in Sports Illustrated or Eagle-Tribune.

4.

Finally, plaintiffs claim that even if published reports did give notice of the necessary facts, they could not have plead a cause of action based upon mere news articles consistent with Federal Rule of Civil Procedure 11. See Rule 11(b) (by signing pleading, attorney certifies that after "an inquiry reasonable under the circumstances ... the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery"). Assuming without deciding that plaintiffs are correct in asserting that a lawsuit may never be brought on the strength of news

articles alone, this contention is nonetheless wholly unpersuasive.

I do not suggest that plaintiffs should have brought suit merely upon the representations in news articles. Rather, these sources gave notice of both the existence of plaintiffs' potential claim and sources of whom plaintiffs could have inquired for verification and further information. Plaintiffs would have acted consistent with Rule 11 had they simply contacted sources cited by Sports Illustrated or The Eagle-Tribune to verify those articles' charges. [FN34] With regard to the Garvey report, moreover, plaintiffs had available not mere journalism, but the result of extensive investigations by lawyers and player agents, among others, written by a lawyer. (See, e.g., Second Supp. Garvey Aff. ¶¶ 5-10.) I am inclined to think such a report would of itself be sufficient foundation for a lawsuit; at any rate, plaintiffs could have assured themselves of compliance with Rule 11's mandate by inquiring of the report's contributors and author as to the evidence supporting their charges.

> FN34. Thus, plaintiffs' reliance on Greenfield v. U.S. Healthcare, 146 F.R.D. 118 (E.D.Pa.1993), in which the court sanctioned an attorney who brought a securities action merely on the basis of an article in the Wall Street Journal and a complaint filed by another attorney, is not helpful to their cause. While concluding that "reliance across the board on a Wall Street Journal article alone, without some form of independent inquiry, is insufficient to satisfy the requirements of Rule 11," id. at 127, the court found that another attorney who had conducted some research to verify the accuracy of the news report had conducted reasonable inquiry under the circumstances. Id. at 124.

D.

Since plaintiffs had notice of all the elements of their claim prior to November 1991, any claims for injuries incurred before that date are barred unless the statute of limitations was tolled because defendants affirmatively mislead them as to the nature or significance of those facts so as to prevent plaintiffs from recognizing their cause of action.

Most of defendants' alleged concealment amounts to denials of wrongdoing and refusals to provide financial documentation. Mere denials of wrongdoing will not of themselves toll the statute of limitations. See, e.g., Pocahontas Supreme Coal Co. v. Bethlehem Steel, 828 F.2d 211, 218-18 (4th cir.1987); Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1416; Bausch v. Philatelic Leasing, Ltd., 728 F.Supp. 1201 (D.Md.1990). Nor will the statute be tolled because a defendant refuses to disclose a smoking gun to a plaintiff already on notice of his or her cause of action. See Pocahontas, 828 F.2d at 218-19. The plaintiff may, of course, collect further information during the limitations period and, to the extent stymied, seek it in discovery. But the running of the limitations period will not await the plaintiff's satisfaction as to the merits of his or her case, much less the defendant's voluntary self-incrimination. [FN35] Id.; cf. Cada, 920 F.2d at 451.

> FN35. Plaintiffs do not allege that they ever obtained the financial data they sought from Eagleson and others, yet they nonetheless eventually managed to file this suit.

The only alleged acts of concealment of a potentially misleading nature were Eagleson's claims that independent audits by outside accounting firms had verified that the finances of international hockey and the NHLPA were in order. [FN36] In light of his fiduciary duties to union members and the persistence of his accusers' allegations and attempts to obtain information,

however, Eagleson's continuous refusal to release financial information and audits which purportedly cleared him of wrongdoing could not reasonably be interpreted as anything other than further evidence of possible wrongdoing. [FN37]

> FN36. Only plaintiffs Forbes, Park, and Smail suggest in their affidavits that they were mislead at the time by Eagleson's 1990 representations about purported audits.
>
> FN37. Cf. Bausch v. Philatelic Leasing, Ltd., 728 F.Supp. 1201, 1207 (D.Md.1990) ("plaintiffs were given legally sufficient notice as to their potential causes of action. Therefore, they were not justified in relying on the assurances of the potential defendants to justify their failure to investigate further."); Hodas v. Sherburne, Powers & Needham, 938 F.Supp. 60, 63 (D.Mass.1996) (similar). Indeed, the record demonstrates that the purported audits did not assuage plaintiff Forbes' concerns about international hockey. (See Comp. ¶¶ 101-115; Forbes Aff., Ex. J. K.)

Moreover, Eagleson's misrepresentations could not have mislead plaintiffs as to the facts essential to their claim. Naked representations that international hockey finances were audited and in order could not, for example, negate the claims of several former Eagleson employees and Eagleson's own admission that he had subsidized the salaries of his private employees with international hockey money, or undo Eagleson's admission that he gave control of Canada Cup advertising rights to a close associate whom various other sources claimed he controlled, or obscure insurance brokers' and players' claims that he had used his control over disability insurance to extort legal fees and other personal benefits from them. [FN38] Compare Salois v. Dime Savings Bank, 128 F.3d 20, 26 (1st Cir.1997) (even if defendant had misrepresented allegedly fraudulent loans, statute not tolled

where the loan documents themselves contained all information necessary to put plaintiffs on notice of the fraud). [FN39]

FN38. Plaintiffs' argument that Eagleson's (or the NHL defendants') refusals to disclose financial documentation or admit wrongdoing were sufficient to toll the statute of limitations because he owed a fiduciary duty of disclosure to the players fails for the same reasons. "A fiduciary's lie or failure to disclose significant information is relevant only if it actually conceals an injury from the plaintiff." Hodas, 938 F.Supp. 60, 64 (D.Mass.1996); see also Salois v. Dime Savings Bank, 128 F.3d 20, 26 n. 11 (1st Cir.1997) ("even if plaintiffs' allegations regarding fraud and fiduciary duties are true, plaintiffs still fail the ultimate test, that of reasonableness in discovering and pursuing their claims").

FN39. Plaintiffs Park and Smail also suggest in their affidavits that they were mislead by the player representatives' failure to fire Eagleson in 1989 after Garvey released his report. They do not say whether they were aware of the nature of the representatives' vote--a close one which Eagleson survived only after promising to seek a successor, to terminate his management of international hockey, and to disclose personal and union financial information (Pls. B. at 41).
Since Park read The Eagle-Tribune articles long after the player representatives' vote, he could not have been mislead by that vote as to facts reported in those articles. More generally, even assuming the player representatives' vote could somehow be imputed to defendants as fraudulent concealment which might toll the statute of limitations, no reasonable jury could find that relying on such a vote as assurance that Eagleson had committed no wrongdoing was reasonable or

consistent with plaintiffs' duty of diligent inquiry. And most importantly, as with Eagleson's representations about audits the player representatives' vote could not negate the facts of which plaintiffs were or should have been aware showing the existence of their claim.

Plaintiffs' reliance on the doctrine of fraudulent concealment also fails because they do not show that information adequate to alert them to their claim came to light only subsequent to (or despite) defendants' concealment and within the statute of limitations period. See Salois, 128 F.3d at 26, n. 9. Plaintiffs assert that it was the indictment which finally provided them with sufficient notice to file suit. The indictment, however, simply reiterated or elaborated upon Eagleson's self-enriching schemes already detailed or hinted at years earlier in the Sports Illustrated and The Eagle- Tribune articles and Garvey report, and none of what little information it did reveal was essential to plaintiffs' claims.

To summarize, I find (1) it is undisputed and indisputable that plaintiffs had inquiry notice of their claim by 1990 at the latest; (2) in the exercise of reasonable diligence plaintiffs should at the very least have inquired into the specific factual allegations in the Garvey and Sports Illustrated reports; (3) these reports, as well as The Eagle-Tribune articles read by two plaintiffs, provided notice to plaintiffs by October 1991 at the latest of more than sufficient facts to show the existence of their claim that the NHL defendants and Eagleson had engaged in a pattern of § 302 violations resulting in inadequate representation and bad deals for the players; and (4) no reasonable jury could find that plaintiffs were mislead as to their cause of action so as to toll the statute of limitations. Accordingly, I conclude that plaintiffs' claims to injuries incurred prior to November 7, 1991 are barred as untimely.

IV.

The statute of limitations does not bar claims for any "new and independent injuries" incurred by plaintiffs after November 7, 1991 as a result of defendants' alleged racketeering activity. See e.g., Glessner v. Kenny, 952 F.2d 702, 707-08 (3d Cir.1991). Defendants argue that there can be no such injury because the last collective bargaining agreement negotiated by Eagleson expired in September 1991 and the next bargaining agreement, negotiated by Eagleson's successor, Bob Goodenow, was signed in January 1993 and effective retroactive only to April 1992.

Plaintiffs argue that Eagleson and the NHL defendants, pursuant to their alleged arrangement, may have undermined Goodenow's collective bargaining negotiations and even contributed to an April 1992 strike by the players. However, other than the general allegation that the players' compensation was artificially suppressed from the mid-1970's through the end of 1991 (Comp.¶ 54), there are no allegations in plaintiffs' fourth amended complaint of such injury or of such wrongdoing. Accordingly, in addition to granting defendants summary judgment with respect to Count I insofar as it asserts claims for injuries incurred prior to November 7, 1991, I will dismiss the remainder of Count I for failure to state a claim upon which relief may be granted.

V.

The accompanying Order disposing of Count I appears to warrant entry of final judgment qualifying for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). However, it is plaintiffs' burden to demonstrate that such certification is appropriate and just. See e.g., Anthuis v. Colt Industries Operating Corp., 971 F.2d 999, 1003 (3d Cir.1992) and Forest

Electric Corp. v. HCB Contractors, 1995 WL 429141, at *2 (E.D.Pa.1995), both citing Allis-Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360 (3d Cir.1975). Accordingly, I will make provision in the Order for plaintiffs to seek such certification should they wish to do so.

ORDER

AND NOW this 27th day of August, 1998, upon consideration of defendants' motions to dismiss or for summary judgment and the parties' filings related thereto, and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

(1) The motion of the NHL defendants as to Count I of plaintiffs' complaint is GRANTED in its entirety: (a) judgment is entered in favor of defendants National Hockey League (NHL), the NHL Member Clubs, John Ziegler, William W. Wirtz, and R. Alan Eagleson and against plaintiffs David S. Forbes, Richard D. Middleton, D. Bradford Park, Ulf Nilsson, and Douglas D. Smail as to plaintiffs' claims for injuries incurred prior to November 7, 1991; and (b) plaintiffs' claims against these same defendants for injuries incurred on or after November 7, 1991 are dismissed for failure to state a claim upon which relief can be granted.

(2) The motion of the Canadian defendants, Jialson Holdings, Ltd., Sports- Management Ltd., Rae-Con Consultants Ltd., and Eagleson, Ungerman, to dismiss or for summary judgment as to Count II is DENIED without prejudice to renewal.

(3) If plaintiffs wish to seek certification of this Order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure they should so move by September 30, 1998.

United States District Court
E.D. Pennsylvania

David S. FORBES, et al.,

v.

R. Alan EAGLESON, et al.
No. CIV. A. 95-7021.
Sept. 10, 1999.

MEMORANDUM

O'NEILL.

The National Hockey League, the NHL Member Clubs, William Wirtz, and John Ziegler (the "NHL defendants") move to dismiss the fifth amended complaint or, in the alternative, for summary judgment. The basic question presented is whether plaintiff Douglas Smail has alleged any claim for injuries that is both timely and cognizable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962, 1964. I conclude he has not, and therefore will enter judgment for the NHL defendants on plaintiff's remaining claims against them.

I.

The original plaintiffs in this case, five former National Hockey League players, brought suit on behalf of a putative class of NHL players on November 7, 1995. In essence, they alleged that the NHL owners and management had colluded for decades with the players' labor representative, defendant R. Alan Eagleson, who was executive director of the NHL Players' Association (NHLPA) from 1967 through the end of 1991. See generally Forbes v. Eagleson, 19 F.Supp.2d 352 (E.D.Pa.1998).

Allegedly, the NHL defendants conspired to give Eagleson certain plums, such as leadership of international hockey tournament events, which he used with their acquiescence to enrich himself and his family and friends, and Eagleson, in turn, betrayed the interests of the hockey players both in collective bargaining and in his day-to-day conduct of labor- management relations. The defendants' collusive conduct allegedly constituted a pattern of violations of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 186, and thus a pattern of racketeering acts in violation of RICO. See Forbes 19 F.Supp.2d at 359-60.

The NHL moved for summary judgment on grounds that RICO's four-year statute of limitations had run on any claims accrued more than four years before plaintiffs filed suit (i.e., before November 7, 1991) because plaintiffs knew or should have known of defendants' alleged collusion by at least the fall of 1991. I agreed and granted partial summary judgment to the NHL defendants and Eagleson. [FN1] See id. I also dismissed plaintiffs' claims for injuries incurred within the limitations period for failure to state a claim upon which relief could be granted. Id. at 377. Plaintiffs then sought leave to amend their complaint to properly plead claims for injuries incurred after November 7, 1991, which I granted. See Forbes v. Eagleson, 183 F.R.D. 440 (E.D.Pa.1998). As a result of my prior statute of limitations ruling, however, only plaintiff Douglas Smail could continue to press claims because he was the only one of the named plaintiffs who played in the NHL after November 1991.

> FN1. Plaintiffs also asserted a claim against Eagleson and certain of his companies (the "Canadian defendants") for pilfering money from the union. The Court has not yet addressed the timeliness of that claim.

II.

Defendants move to dismiss or for summary judgment. Because defendants' arguments are based on facts that do not appear in the complaint and both parties have attached to their briefs and relied upon material extraneous to the pleadings, I consider the motion as one for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Proc. 56(c). In resolving the motion, I view the evidence and all reasonable inferences to be drawn therefrom in favor of plaintiff as the non-moving party. See, e.g., Reitz v. County of Bucks, 125 F.3d 139, 143 (3d Cir.1997).

I note that plaintiff asserts he needs discovery in order to respond to defendants' motion. (See Pls. Brief at 2). Specifically, he appears to argue that he needs some two decades worth of discovery to establish that defendants' 27-year conspiracy continued to cause damage to the players into the limitations period. (See Pls.' Brief at 4-5, 8-9; Pls.' Ex. D, Declaration of Roger G. Noll.) In my view this contention is patently lacking in merit and plaintiff does not need any discovery to address the merits of defendants' motion. Indeed, I proceed (as do defendants' arguments) on the assumption that plaintiff can establish that he continued to suffer damage into the limitations period. Specifically, as set forth further below, I assume that defendants' alleged 25 years of labor-management collusion resulted in a 1988 collective bargaining agreement that was not as good for the players as it should have been and, more generally, reduced both the baseline compensation levels (and bargaining positions) of the players and their bargaining strength, which in turn meant that subsequent collective bargains were not as good as for the players as they would have been but for that history of collusion. [FN2]

FN2. Plaintiffs also protest that defendants' motion is barred by Rule 12(g). See Fed.R.Civ.Proc. 12(g) (requiring consolidation of Rule 12 motions); see generally 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, §§ 1384-86, 1388 (2d ed.1990). I think this contention lacks merit given the procedural posture of the case and, in any event, it is moot in light of my treatment of the motion as one for summary judgment.

III.

In the fifth amended complaint, Smail alleges that, within the limitations period and pursuant to defendants' on-going, decades-old conspiracy, Eagleson failed to adequately prepare the players' union for collective bargaining, failed to represent aggressively the players' interests in the day-to-day conduct of labor-management relations, and communicated with the NHL defendants both during and after he headed the union to undermine and embarrass the union and cause the NHL to take a hard-line position that may have contributed to the players' April 1992 strike. (Compl.¶ 56.) As a result of these actions, Smail allegedly suffered injuries in that (1) the players would have gotten better benefits earlier and might have avoided the April strike altogether had Eagleson not encouraged the NHL to take a hard line and/or had he better prepared the union for collective bargaining negotiations in 1992; and (2) the players "continued to suffer suppressed compensation in subsequent years." (Amended Compl. ¶ 57.)

The record establishes the following additional undisputed facts. [FN3] The last collective bargaining agreement ("CBA") negotiated by defendant Eagleson was executed on June 1, 1988 and expired by its terms on September 15, 1991. As

of January 1, 1991, Eagleson's employment with the NHLPA ended and Robert Goodenow took over as the union's executive director. After the 1988 collective bargain expired, the NHL and the NHLPA failed to agree to new terms and the 1991-92 season began without a new agreement. On April 1, 1992, days before the Stanley Cup playoffs were to begin, the players went out on a strike. Ten days later, on April 11, 1992, the NHL and the NHLPA reached an agreement on the major terms of a new agreement. The agreement was ultimately executed on January 21, 1993, but some provisions were made retroactive to September 16, 1991 (when the 1988 CBA expired), and the rest were retroactive to April 11, 1992.

> FN3. See Lovelace Decl.; Bolduc Aff., and Exhibits A and B attached to Defs.' Motion; Fifth Amended Complaint at ¶¶ 19

On August 29, 1991, before the 1988 CBA had expired, plaintiff Smail signed a "Standard Player Contract" as an unrestricted free agent to play with the Quebec Nordiques for the 1991-92 season. The standard terms of the Standard Player Contract were governed by the 1988 CBA. Smail never missed a paycheck during the 1991-92 season as a result of the strike. His contract with the Nordiques expired on July 1, 1992, and on August 31, 1992, he signed a new Standard Player Contract with the Ottawa Senators. The terms of this contract, which expired on August 31, 1993, were governed by the new CBA negotiated by Goodenow. The 1992-93 season was Smail's last.

III.

Defendants' motion presents two primary questions. One is whether plaintiff has stated a claim for any "new and independent" injury within the limitations period. See generally Glessner v. Kenney, 952 F.2d 702, 707-08 (3rd Cir.1991)

(discussing "new and independent injury" requirement for separate accrual of RICO claims). The second is whether any such new and independent injuries are sufficiently causally related to defendants' alleged racketeering and sufficiently certain to be recoverable under RICO. See generally Steamfitters Local Union No. 420 Welfare Fund, 171 F.3d 912, 923-934 (3rd Cir.1999) (discussing the proximate cause requirement for standing to assert RICO claim).

Defendants argue that Smail could not have suffered any new and independent injury after November 1991 as a result of defendants' alleged misconduct because he was already under contract with his club before November 1991, never lost a paycheck as a result of the April 1992 strike, and signed his next contract for the 1992-93 season under the 1992 collective bargaining agreement negotiated by the players' new union leader, Robert Goodenow, who is not alleged to have ever colluded with the NHL defendants. The new collective bargaining agreement was retroactive in part, moreover, to September 16, 1991. Thus, even if Eagleson had helped instigate the April 1992 strike or the NHL defendants and Eagleson had otherwise colluded to hinder and delay collective bargaining, Smail could not have suffered any injury from the delay. Any injuries that plaintiff can identify, defendants further argue, amount to no more than the "continuing effects" of harm incurred prior to November 1991, for which he cannot recover due to the running of the statute of limitations, or are too remote, uncertain, and speculative to be recoverable.

Plaintiffs counter that they are not just alleging that defendants' alleged collusion delayed a new agreement, but that it resulted in a new collective bargain that was not as good for the players as it should have been. (Pls.' Brief at 2.) I am not sure that plaintiff's assertion is consistent with a close reading of the complaint, which seems to allege only that "greater benefits"

were delayed in coming (until the end of the strike), not that they did not come. (See Amended Compl. ¶ 57.) For the sake of argument, however, I will accept plaintiff's characterization of his complaint. Plaintiff also argues that he was injured by the failure of the players to obtain a new CBA in 1993 and by a lockout that occurred in 1994-95. (See Pls. Brief at 5-7.) There are no such allegations in the complaint, however, and, in any event, it is undisputed that the 1992-93 season was Smail's last. Accordingly, he could not have suffered injury after that time and has no standing to maintain these latter claims.

As already mentioned, my previous ruling has established that the plaintiff hockey players, including Smail, knew or should have known by at least October 1991 that the NHL defendants and Eagleson had engaged in a pattern of labor-management collusion resulting in bad representation and poor deals for the players. Accordingly, plaintiff's claims for injuries incurred prior to the limitations period--before November 7, 1991--were barred. 19 F.Supp.2d at 377. In light of that ruling, Smail cannot (and does not) press a claim for injuries incurred because his 1991-92 contract was governed by the allegedly collusive 1988 CBA negotiated by Eagleson. Because plaintiff knew or should of known by October 1991 that his 1991-92 contract reflected defendants' alleged collusion, his injury was sustained, fully determinable, and actionable at that point. See Glessner, 952 F.2d at 708.

Thus, plaintiff's arguments that he suffered new and independent injuries after November 1991 center on the collective bargaining agreement negotiated in April 1992 by the union's new leader, Robert Goodenow. Although plaintiff was already under an individual contract for the 1991-92 year governed by the 1988 CBA and did not lose any money as a result of the April 1992 strike, he argues that because some provisions of the new 1992 CBA were made retroactive to

September 1991 he could have retroactively enjoyed in his 1991-92 contract year the better 1992 CBA terms that would have been obtained but for the defendants' misconduct. Of course, he also would have enjoyed the terms of this hypothetically better 1992 CBA when he later negotiated his 1992-93 contract.

Plaintiff alleges that defendants' wrongdoing caused a poor 1992 CBA in two ways. Between November 7, 1991 and December 31, 1991, and thereafter, Eagleson allegedly communicated to management his belief that the players would not strike, which allegedly made the NHL owners more intransigent and thus helped cause the strike, which in turn somehow led to a worse collective bargaining agreement than the players would have achieved if it were not for the strike. [FN4] I assume for the sake of argument that Eagleson's alleged communications about the unlikelihood of a strike could be considered racketeering acts or part of a racketeering scheme. Nonetheless, I think these communications were simply too remote from the 1992 CBA negotiations, and their effect in possibly contributing to the strike (and thence affecting negotiations) too speculative, to be considered a proximate cause of a poor 1992 CBA.

> FN4. In addition to being somewhat incredible, plaintiff's arguments concerning Eagleson's role in instigating the 1992 strike are somewhat untethered to any alleged racketeering activity. Plaintiff argues as if he can base a RICO claim on Eagleson's conduct even after he no longer represented the union. Of course, this is not so. The racketeering acts supporting plaintiff's RICO claim consist of Eagleson's alleged mail fraud and collusion with management--acts which were unlawful precisely because Eagleson headed the players' union. Since Eagleson's representation of the union ended at the end

of 1991, plaintiffs' RICO claims can only be based on his alleged collusive acts up until December 31, 1991.

Plaintiff also claims that defendants' history of collusion weakened the union and artificially reduced the players' negotiating position (i.e., their historic compensation baseline) and thus lead to the poor 1992 CBA. (See Pls.' Brief 4-9; Noll Decl.; Amended Compl. ¶ 57.) In my view, this claim does not set forth new and independent injuries. See Glessner, supra ; Pilkington v. United Airlines, 112 F.3d 1532, 1536-38 (11th Cir.1997) (discussing cases applying "new and independent injury" separate accrual rule). Just as plaintiff cannot recover for the alleged reduction in his compensation that lingered past November 1991 as a result of the 1988 CBA negotiated by Eagleson, plaintiff cannot recover damages arising from the fact that Eagleson's 20-year collusion with the NHL defendants had artificially reduced the players' historic compensation levels or otherwise weakened the union in a manner that carried over and affected its post-November 1991 collective bargaining position. Such injuries are not "new and distinct ... from the initial injury" caused by defendants' alleged years of colluding prior to 1992. Glessner, 952 F.2d at 708. They are the lingering, obvious consequences of nearly twenty years of alleged misconduct by defendants--misconduct of which the players knew or should have known by at least the fall of 1991. See Forbes, 19 F.Supp.2d at 370-74, 377. Such injuries could have been redressed by a suit filed at that time and/or by collective bargaining. [FN5] Accordingly, plaintiff's claims are barred on the strength of my prior statute of limitations ruling.

FN5. In granting plaintiff leave to amend the complaint, I discussed the "separate accrual" rule for RICO claims and noted the analogy drawn by courts between an on-going racketeering conspiracy and a continuing price-fixing conspiracy in violation of antitrust law. See

Forbes,183 F.R.D. at 444, citing, inter alia, Klehr A.O. Smith Corp., 521 U.S. 179, 117 S.Ct. 1984, 1990, 138 L.Ed.2d 373 (1997) (noting that under antitrust law a victim of a continuing price-fixing conspiracy may sue on each overt act (e.g., each sale) that occurs within the limitations period and causes injury, regardless of his or her prior knowledge of the ongoing conspiracy). Plaintiff might argue, similarly, that he too may recover damages for every year he lost income as a result of defendants' alleged history of collusion. Plaintiff's situation is significantly distinct from that of the victim of a price fixing conspiracy, however. The latter is at the mercy of two or more conspiring third parties and has no control over whether or not the conspiracy continues into the future, and incurs no damages until such time as s/he buys price-fixed goods, at which point damages are certain and discrete. Players' union members such as Smail, on the other hand, have control over one of the two sides allegedly involved in a collusive labor-management conspiracy (their labor representative) and control their collective bargaining position. Since the hockey players knew or should have known of their representative's alleged collusion, they could have addressed it and its foreseeable consequences in court (by seeking injunctive and/or monetary relief for any future harm sufficiently certain to be visited on them) or in subsequent collective bargaining negotiations.

Alternatively, I reach the same conclusion analyzing plaintiff's claims in terms of proximate cause, a fundamental requirement for recovery which is usually analyzed in the RICO context in terms of the plaintiff's standing to assert a claim. See generally Callahan v. A.E.V., Inc., 182 F.3d 237, 1999 WL 437289, at *22-*28 (3rd Cir.1999); Steamfitters Local Union, 171 F.3d at 923-934. Crucial, in my view, are the facts that, one,

the players (and hence their union) knew or should have known of defendants' pre-1992 collusion, and two, that a new and untainted union leader, Robert Goodenow, negotiated the 1992 collective bargaining agreement. These intervening factors, together with the complex, unpredictable, and adversarial intangibles of collective bargaining, compel me to conclude that the connection between defendants' alleged racketeering and the collective bargain negotiated in April 1992 is simply too remote and speculative to sustain plaintiff's claim. Cf. Seawell v. Miller Brewing Co., 576 F.Supp. 424, 430-31 (M.D.N.C.1983) (plaintiffs' claims against employer for lay off due to low seniority resulting from alleged collusion between union and employer were barred by intervening collective bargain negotiated by different union which knew of the alleged prior collusion yet did not redress plaintiffs' seniority claims).

V.

In sum, I conclude that the NHL defendants have established that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law as to plaintiff's remaining claims against them.

ORDER

AND NOW this day of September, 1999, upon consideration of the NHL defendants' Motion to Dismiss the Fifth Amended Complaint or for Summary Judgment, plaintiff's Motion for an Extension of Time and to Compel Discovery or to Strike, and the parties' filings related thereto, it is hereby ORDERED that plaintiff's motion is DENIED and defendant's motion is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to certify the class is DENIED as moot.

AND IT IS FURTHER ORDERED pursuant to Federal Rule of Civil Procedure 54(b) that the Court finds there is no just reason for delay and that final judgment is therefore entered in favor of the NHL defendants and against plaintiffs with respect to all claims against the NHL defendants, and in favor of R. Alan Eagleson and against plaintiffs with respect to Count I of the complaint.

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1803

DAVID S. FORBES; RICHARD D. MIDDLETON; D. BRADFORD PARK; ULF NILSSON; DOUGLAS D. SMAIL, suing individually and on behalf of a class of similarly situated individuals, to wit, all persons employed as professional hockey players by any of the defendant professional hockey teams during the time period in which defendant R. Alan Eagleson served as Executive Director of the National Hockey League Players Association

v.

R. ALAN EAGLESON; THE NATIONAL HOCKEY LEAGUE; PHILADELPHIA FLYERS LIMITED PARTNERSHIP; BOSTON PROFESSIONAL HOCKEY ASSOCIATION, INC.; NIAGARA FRONTIER HOCKEY, L.P.; CALGARY FLAMES LIMITED PARTNERSHIP; CHICAGO BLACKHAWK HOCKEY TEAM, INC.; DALLAS HOCKEY CLUB, INC.; DETROIT RED WINGS, INC.; EDMONTON OILERS HOCKEY CORP.;

David S. Forbes; Richard D. Middleton; D. Bradford Park; Ulf Nilsson; Douglas D. Smail,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 95-07021)

SUR PETITION FOR REHEARING

BEFORE: SCIRICA, NYGAARD, ROTH, FUENTES and GREENBERG, *Circuit Judges*[1]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/ [Illegible]
United States Circuit Judge

DATE: 21 NOV 2000

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[1] Judge Greenberg's vote is limited to panel rehearing only.

Supreme Court, U.S.
FILED
MAY 24 2001
OFFICE OF THE CLERK

No. 00-1623

IN THE

Supreme Court of the United States

DAVID S. FORBES, *ET AL.*,

Petitioners,

—v.—

R. ALAN EAGLESON, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

When a defendant in a RICO case moves for summary judgment on statute of limitations grounds, are the plaintiffs entitled to toll the running of the limitations period because of the defendants' fraudulent concealment if there is undisputed evidence that the plaintiffs had all of the facts they needed to file suit in a timely manner?

LIST OF PARTIES

The following named respondents, on whose behalf this opposition is being filed, are referred to collectively herein as the "NHL Respondents:"

The National Hockey League; Philadelphia Flyers Limited Partnership; Boston Professional Hockey Association, Inc; Niagara Frontier Hockey, L.P.; Calgary Flames Limited Partnership; Chicago Blackhawk Hockey Team, Inc.; Dallas Hockey Club, Inc.; Detroit Red Wings, Inc.; Edmonton Oilers Hockey Corp.; KTR Hockey Limited Partnership; LAK Acquisition Corp.; Le Club de Hockey Canadien, Inc.; Meadowlanders, Inc.; New York Islanders Hockey Club, L.P.; Rangers Hockey Club, a division of Madison Square Garden Center, Inc.; Pittsburgh Hockey Associates; Comsat Entertainment Group, Inc., a subsidiary of Comsat Corporation; St. Louis Blues Hockey Club, L.P.; San Jose Sharks Corp.; Maples Leaf Gardens, Limited; Vancouver Hockey Club, Ltd.; Washington Hockey Limited Partnership; Jets Hockey Ventures, (a Limited Partnership); John Ziegler; William W. Wirtz; Colorado Avalanche LLC.

CORPORATE DISCLOSURE STATEMENT

The NHL Respondents jointly make the following disclosures in accordance with Supreme Court Rule 29.6*:

AOL Time Warner, Inc.
AT&T Corp.
Boca Resorts, Inc.
Cablevision Systems Corporation
Comcast Corporation
Fox Entertainment Group, Inc.
Gaylord Entertainment Company
General Electric Company
Molson, Inc.
News Corporation
Toronto Dominion Bank
Walt Disney Company

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* The publicly held companies listed above hold a direct or indirect interest in an NHL Member Club, although they do not necessarily hold 10% or more of a party's stock. In addition, these companies may have a financial interest in the outcome of the litigation.

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NHL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Third Circuit, after conducting its own *de novo* review of an extensive summary judgment record, rejected petitioners' claim of fraudulent concealment, concluding that the "unmistakable historical facts demonstrate that the plaintiffs were aware or should have been aware of the facts supporting their [RICO] claim long before" the statute of limitations began to run. (33a[1]) Contrary to petitioners' contention, the court below did not reach this result based on a finding that the record merely raised "suspicions of wrongdoing." (Pet. at 2.) Rather, consistent with the standards applied on summary judgment in every other circuit, the court concluded that, since "there was nothing obscure about the actionable conduct here" (33a), petitioners "either knew or should have known the facts supporting their course [sic] of action well prior to four years before they brought this case" (32a).

Rather than presenting a conflict among the circuits, this case reflects, at most, petitioners' disagreement with the Third Circuit's evaluation of the record under hornbook summary judgment principles. The petition should therefore be denied.

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[1] Citations in the form "___a" refer to the appendix to the petition in this Court. Citations in the form "A___" refer to the Joint Appendix filed on appeal to the Court of Appeals for the Third Circuit.

COUNTER-STATEMENT OF THE CASE

A. Introduction

Petitioners, on behalf of themselves and a purported class (that was never certified) of more than 1,000 former professional hockey players, commenced this suit in November 1995. Petitioners sought treble damages arising out of an alleged racketeering conspiracy that they claimed began in the 1970s and continued for nearly two decades. According to the petitioners, the leader of their labor union routinely stole union money and otherwise used various positions of power to profit personally at the expense of the union membership. Petitioners' employers, they contended, knew of but acquiesced in this wrongful activity because it resulted in collective bargaining agreements favorable to them.

Whatever this alleged conspiracy may have been, however, it was not a secret. The accusations were the subject of, among other things, a 1984 article in *Sports Illustrated*, one of the most widely read magazines in the country, and a lengthy report issued in the summer of 1989 by a sports labor lawyer specifically hired by union members to investigate possible wrongdoing by their leader. Moreover, the accusations of the 1995 complaint in this action can actually be found – virtually *in haec verba* – in a pleading filed more than four years earlier with an administrative tribunal in Canada.

When the petitioners finally commenced this action, they chose the Third Circuit as their venue concededly to

benefit from what was then the most permissive accrual rule for civil RICO claims in the country.[2] After that accrual rule was overturned in *Klehr v. A. O. Smith Corp.*, 521 U.S. 179 (1997), the district court granted summary judgment dismissing most of the complaint as time-barred.[3] (36a *et seq.*)

The Third Circuit, with the further benefit of *Rotella v. Wood*, 528 U.S. 549 (2000), which rejected the "injury plus pattern discovery" rule – the rule that had been adopted by the Third Circuit after *Klehr* and applied by the district court in this case – affirmed. (2a *et seq.*)

Recognizing that their claims would be time-barred regardless of which of the two remaining civil RICO accrual standards is ultimately adopted by this Court,[4] petitioners now

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[2] Under the then-applicable rule in the Third Circuit, the RICO limitations period extended beyond the point of discovery of injury, or even discovery of all elements of the RICO claim, for so long as "further predicate acts occur which are part of the same pattern," in which case "the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity." *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125, 1126 (3d Cir. 1988).

[3] The district court had initially denied a 1996 motion to dismiss under the constraint of *Keystone*. *Forbes v. Eagleson*, 1996 WL 420829, at *4 (E.D. Pa. July 23, 1996).

[4] In *Rotella*, this Court stated that it would eventually choose one of two accrual rules: (1) an "injury discovery" rule, or (2) an "injury occurrence" rule under which knowledge of injury would be irrelevant. *Rotella v. Wood*, 528 U.S. 549, 554 & n.2 (2000).

focus exclusively on their contention, rejected by both courts below, that the statute of limitations should be tolled because of "fraudulent concealment" on the part of the respondents.

B. The Complaint

Petitioners contended that the NHL Respondents, in order to provide Eagleson with personal monetary benefits, gave him unsupervised control over a variety of international hockey tournaments and allowed him the authority to select and place insurance coverage for NHL players. Petitioners alleged that the NHL Respondents did this "for the purpose of obtaining and exercising control and influence over Eagleson and the NHLPA to grant concessions in connection with collective bargaining, individual players' compensation, and other rights of players" during the time Eagleson served as the NHLPA's Executive Director. (A62) Petitioners claimed injury from these acts, alleging that they would have received additional salary and benefits had Eagleson conducted himself properly during collective bargaining.

C. The 1984 *Sports Illustrated* Article

A 1984 *Sports Illustrated* article entitled "The Man Who Rules Hockey" (A158-69) noted the relatively modest salary increases of NHL players over the preceding decade. According to the Third Circuit (13a-14a), the article charged that Eagleson (1) "in his capacity as executive director of the NHLPA . . . abused his positions as chief negotiator for Hockey Canada"; (2) "had numerous conflicts of interest in his

[various] capacities"; (3) "engaged in acts of self-dealing"; (4) "may have failed properly to represent NHL players in collective bargaining"; and (5) "improperly diverted international hockey funds to his private businesses." (*See also* 51a-56a (district court's extensive findings with respect to the article).)

D. The 1989 Garvey Report

The apparent widespread belief among NHLPA members that Eagleson had for many years engaged in extensive misconduct damaging to the players prompted them to commission attorney Edward Garvey (now co-counsel to petitioners in this action) to conduct an in-depth evaluation of Eagleson's activities. In the summer of 1989, more than 6½ years prior to the commencement of this action, Garvey issued a lengthy and detailed report (the "Garvey Report") (A103-57) that echoed and expanded upon the allegations first made public in the *Sports Illustrated* article. The essence of the Garvey Report was that Eagleson's loyalty had in effect been purchased by the NHL in exchange for Eagleson's right to divert revenues from international hockey tournaments to his own personal benefit. The Garvey Report told the players that, in exchange, Eagleson had made unwarranted concessions in bargaining that resulted in artificially depressed player compensation and benefits. According to the 1989 Garvey Report, "the conflicts of interest are shocking, but even more shocking is a *pattern of sweetheart agreements with the NHL* over all these years." (A109) (emphasis supplied).

E. The 1991 Alberta Complaint and News Reports

The allegations against Eagleson were also the subject of a June 1991 complaint filed by two NHL players with the Alberta Labour Relations Board. (A601-44) The complaint, filed by attorney Rich Winter – a co-author of the 1989 Garvey Report (*see* A103) – charged that Eagleson had been corrupted by the NHL which had permitted him to profit improperly from his role in international hockey. The 1991 Alberta complaint allegations bear a striking resemblance to those of the complaint in this case. Indeed, the Alberta Complaint sets forth in detail the very facts that petitioners here claim they could not have known until Eagleson's indictment three years later. (*Compare* Pet. at 11.)

In addition, a series of articles appeared in a major Boston-area newspaper in September 1991, two months before the limitations period began, reiterating that Eagleson was benefitting personally, and to the players' detriment, from his control of international hockey. (A646-78)

DECISIONS OF THE COURTS BELOW

A. The District Court Opinion

In August 1998, Judge Thomas O'Neill of the United States District Court for the Eastern District of Pennsylvania, in a carefully worded 50-page opinion, applying the "injury plus pattern" discovery rule then in effect in the Third Circuit (42a), held that petitioners' claims for injuries sustained prior

to November 7, 1991 were time-barred (94a). The court held that "by early 1991 at the latest all plaintiffs knew or should have known of allegations that Eagleson had serious conflicts of interest and inadequately represented the players, and all either had learned of or, in the exercise of reasonable diligence, should have inquired into the allegations in the Garvey and Sports Illustrated reports." (76a) Granting the NHL Respondents' motion for summary judgment, the district court concluded:

> Even the most cursory of perusals of any one of these three publications would have revealed to plaintiffs the gist of their claim: Eagleson was enriching himself by means of international hockey and the disability insurance and the NHL defendants knew so but apparently took no action to remove those opportunities from him. Moreover, examination of either the Sports Illustrated or [the 1991 newspaper articles] would have revealed almost every detail of the schemes plaintiffs now allege in their complaint, as well as sources to whom they could have gone for verification or further information.

(76a-77a) Addressing petitioners' fraudulent concealment argument, the district court concluded that "no reasonable jury could find that plaintiffs were mislead as to their cause of action so as to toll the statute of limitations." (94a)

B. The Third Circuit Opinion

The court of appeals, exercising plenary review on the appeal (23a), analyzed the factual record before it and concluded (28a):

> [B]y 1989 at the latest, plaintiffs were aware, or should have been aware, of the injury which they allege in Count I (reduced salary and benefits) and the source of the injury (the improper bargaining behavior by Eagleson). Under an injury discovery rule, nothing more was required to trigger the running of the four-year limitations period.

The court of appeals also rejected petitioners' contention that acts of fraudulent concealment excused their late filing of the complaint. It assumed without deciding that affirmative acts of concealment had occurred, and that the petitioners exercised reasonable diligence in an attempt to uncover the relevant facts. The court then turned to the remaining prong of fraudulent concealment: when plaintiffs had sufficient facts to plead their claim. The court observed (31a) that the test on summary judgment was "whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim" until after the statute of limitations would otherwise have accrued.

The court of appeals noted that while "*Rotella* indicated that 'where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be . . .' applicable, there was nothing obscure about the actionable conduct here." (33a (citation omitted)) Upon a *de novo* review of the record, the Third Circuit concluded that the "unmistakable historical facts demonstrate that the plaintiffs were aware or should have been aware of the facts supporting their Count I claim long before November 7, 1991." (*Id.*)[5]

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[5] The court of appeals further rejected the petitioners' contentions that they and their attorneys could not have signed a federal complaint consistent with their obligations under Fed. R. Civ. P. Rule 11 prior to November 7, 1991, agreeing with the district court that petitioners "'could have actually pled almost every allegation in their complaint' . . . based on the facts contained in the various publications available to them.'" (33a)

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

1. There is No Conflict Among the Circuits Warranting This Court's Intervention.

a. The Third Circuit Opinion

Petitioners erroneously argue that the Third Circuit, reviewing *de novo* the district court's grant of summary judgment, imposed *on them,* rather than on the NHL Respondents as moving parties, the burden of proving "that [petitioners] did not have enough knowledge to file suit before the statute of limitations would have otherwise expired." (Pet. at 14.) Petitioners accuse the Third Circuit of having erroneously drawn factual inferences to benefit the defendants, and of having placed a burden on plaintiffs "not just to offer evidence that could support a jury verdict, but to *prove,* indisputably, that they did not have enough knowledge to file suit before the statute of limitations would have otherwise expired." (*Id.*) (original emphasis).

The opinion below can be searched in vain for any such statements. Indeed, mindful of petitioners' criticisms of the procedures allegedly adopted in this regard by the district court,[6] the Third Circuit carefully articulated the paradigm it

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[6] (*See* 28a-29a) In the Third Circuit, petitioners devoted approximately 50 pages of their briefs to the fraudulent concealment argument.

intended to use for analysis of the NHL Respondents' entitlement to summary judgment in this case. Assuming, without deciding, that there was sufficient evidence to support a finding that respondents engaged in acts of fraudulent concealment and petitioners exercised reasonable diligence to discover their claim, the court of appeals wrote (31a):

> Thus, ordinarily when plaintiffs seek to demonstrate a case for equitable tolling, and defendants seek summary judgment on the issue, a court must determine . . . whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim until a time within the limitations period measured backwards from when the plaintiffs filed their complaint. Absent evidence to support these findings there is no genuine dispute of material fact on the issue . . . .

Upon an independent review of the record, the court concluded that petitioners had all the information they needed to bring suit long before the commencement of the limitations period, and therefore they could not avail themselves of the fraudulent concealment doctrine. (32a-33a)

The court had little difficulty rejecting petitioners' contention "that they lacked sufficient information until [Eagleson] was indicted to plead their RICO claim consistently with Fed. R. Civ. P. 11," because "the unmistakable historical

facts demonstrate that the plaintiffs were aware or should have been aware of the facts supporting their Count I claim long before November 7, 1991." (33a) Likewise, the Third Circuit found unpersuasive petitioners' argument that their delay should be excused because it took federal prosecutors until 1994 to obtain a criminal indictment against Eagleson (Pet. at 22), reasoning that "civil RICO cases are brought in situations in which it is hardly conceivable that there could be a criminal indictment." (35a)

The Third Circuit looked exclusively to the evidence introduced by the NHL Respondents and concluded *de novo*, as had the district court, that the NHL Respondents had demonstrated that the petitioners possessed sufficient information to plead Count I of their complaint long before November 7, 1991. Nothing in its opinion suggests that inferences were improperly drawn in favor of the NHL Respondents or that any burdens whatsoever were imposed on or shifted to the petitioners.

While petitioners may try to clothe their argument as an issue of law worthy of this Court's attention, their disagreement is really with the *weight* the Third Circuit gave to the evidence before it, including the *Sports Illustrated* article and the Garvey Report. These sources, petitioners urge, were only sufficient to trigger "suspicions" of wrongdoing by Eagleson, not knowledge. (Pet. at 9-13.) But the court of appeals did *not* say (Pet. at 22) that "a defendant can obtain summary judgment . . . by offering no more than a press report raising a suspicion of racketeering activity." Nor did the Third

Circuit rule as a matter of law that a civil RICO claim accrues when "a plaintiffs' suspicion of wrongdoing should have been aroused" (Pet. at ii). Rather, it merely used the word "suspicion" at one point of its opinion in describing a portion of the Garvey Report (15a). That does not derogate from the court's determination -- based on the entirety of the Garvey Report and the other evidence submitted by the NHL Respondents -- that the petitioners "knew or reasonably should have known the facts supporting their cause of action" prior to November 7, 1991.

b. The Other Circuits Are Not In Conflict.

Petitioners point to cases in four other circuits that they contend "explicitly set forth the rule that, on summary judgment, a moving defendant has the burden of demonstrating, by undisputed evidence, that a plaintiff had not merely suspicion, but also the facts needed to plead his claim, despite the defendant's fraudulent concealment." (Pet. at 14-15.) We agree that where there has been fraudulent concealment, the party seeking summary judgment on statute of limitations grounds must establish that the claimant knew or should have known the facts underlying the claim before the beginning of the limitations period. In fact, while their precise verbal formulations may differ, *every circuit* -- including the Third Circuit -- agrees and has applied essentially the same test.

For example, there is nothing in *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *cert.*

denied., 529 U.S. 1130 (2000), to support petitioners' contention that it "stands in direct conflict with the Third Circuit's ruling here." (Pet. at 17.) In that case, after describing the burden a plaintiff claiming fraudulent concealment would have to carry at trial, the Eleventh Circuit observed that:

> [o]n motion for summary judgment, however, the moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law. To be entitled to judgment on this issue, then, the [defendant] Dairies must show that plaintiffs either knew of their claim or had notice sufficient to prompt them to investigate and that, had they done so diligently, they would have discovered the basis for their claims. If the Dairies point to such facts in the record, then plaintiffs must demonstrate that these facts are in dispute.

198 F.3d at 832 (internal citations omitted). This discussion of the trial burdens and applicable summary judgment standards is remarkably similar to that contained in the Third Circuit's opinion below. (31a) Summary judgment was ultimately denied to the defendants in *Morton's Market* because the information available to the plaintiffs did not provide them with a sufficient basis for their claims. Simply put, in contrast to the Third Circuit's conclusion here, the court in *Morton's Market* was not satisfied that the movants had submitted

sufficient evidence that the plaintiffs were on notice of their claims.

Likewise, the Fifth Circuit, in *Texas v. Allan Construction Company*, 851 F.2d 1526 (5th Cir. 1988), also featured by petitioners (Pet. at 17-18), held that a statute of limitations may be "tolled [for fraudulent concealment] only until such time as the plaintiff, exercising reasonable diligence, could have discovered the facts forming the basis for the claim." *Id.* at 1533. Actual knowledge of such facts is not required to start the clock running, according to the court, but inquiry notice will be sufficient if the plaintiff, through the exercise of reasonable diligence, would have been able to determine the facts. *Id.* There is simply no material difference between the legal standard established in *Allan Construction* and that discussed by the court below.

The related Seventh Circuit cases of *Law v. Medco Research, Inc.*, 113 F.3d 781 (7th Cir. 1997) and *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), discussed at length by petitioners (Pet. at 18-20), appear to have been selected for exposition because they both offer the view that a "mere suspicion" is insufficient in itself to trigger the commencement of the limitations period. *Law*, 113 F.3d at 785-86; *Fujisawa*, 115 F.3d at 1335. Notwithstanding those comments, the Seventh Circuit recognized that suspicious circumstances that are "sufficiently probative," *Fujisawa*, 115 F.3d at 1335, *i.e.*, that are coupled with "ease of discovering, without the use of legal process, whether the suspicion is well

grounded," will nevertheless end any limitations toll. *Law*, 113 F.3d at 786.[7]

Based on these authorities, petitioners urge that the Third Circuit erred by not requiring the NHL Respondents to produce evidence "that, prior to Eagleson's indictment, plaintiffs could have uncovered the facts needed to plead that Eagleson had been bribed by the owners." (Pet. at 22.) That contention, however, is fundamentally at odds with the plain language of the decision of the court below and its finding that "there was nothing obscure about the actionable conduct here." (33a) Indeed, the Third Circuit specifically concluded that petitioners "knew of sufficient facts to support their claim at least 6 years before they filed this case." (32a) The court continued (*id.*):

> In particular, they certainly knew of Eagleson's poor representation of them and that, with the cooperation of the NHL defendants, he was profiting from international hockey through use of the players' labors. Although it is true that Eagleson denied wrongdoing, nonetheless, his denials do not allow plaintiffs, who were

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[7] *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989), referred to by petitioners (Pet. at 21), is no more persuasive. There, the court observed that in order to establish "notice" for statute of limitations purposes a defendant must show something more than "'the kind of notice -- based on hints, suspicions, hunches or rumors -- that requires a plaintiff to make inquiries in the exercise of due diligence,'" *id.* at 1494 (quoting *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984)).

aware of their potential claim, to allege ignorance.

Thus, petitioners have failed to demonstrate that the approach of the four circuits highlighted in their brief is "fundamentally at odds with that of the Third Circuit." (Pet. at 21.) Contrary to petitioners' contention (*id.*), there is no reason to believe that the outcome of this case would have been any different had the rule in those circuits been followed. In fact, *every* circuit follows the standards articulated by the Third, Fifth, Seventh, Eleventh and District of Columbia Circuits, discussed above.[8]

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[8] *See, e.g., J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1252 (1st Cir. 1996) (summary judgment affirmed where documents in plaintiffs' possession "contained 'sufficient storm warnings,' which would have alerted them to the possibility of fraud had they acted with reasonable diligence"); *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992) (ruling on summary judgment that the fraudulent concealment toll ended when plaintiff had sufficient knowledge of the relevant facts); *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974) (affirming summary judgment on statute of limitations grounds despite allegations of fraudulent concealment where plaintiff had the facts necessary to bring suit 14 years before commencing litigation); *Jarrett v. Kassel*, 972 F.2d 1415, 1424, 1428 (6th Cir. 1992) (summary judgment denied where plaintiffs had made a sufficient showing of due diligence; case remanded for consideration of other elements of fraudulent concealment defense); *Miles v. A.O. Smith Harvestore Products, Inc.*, 992 F.2d 813, 816-17 (8th Cir. 1993) (affirming summary judgment dismissing RICO claim on statute of limitations grounds despite allegations of fraudulent concealment where "the evidence leaves no room for a reasonable difference of opinion" as to plaintiffs' knowledge of the facts underlying her claim); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987) (affirming summary judgment dismissing claim on

Accordingly, there is no reason for this Court to grant this petition. While petitioners may quarrel with the court of appeals' assessment of the evidence before it, their efforts to establish the existence of a substantial legal question warranting this Court's review are unavailing.

2. There Are No Public Policy Reasons Warranting a Grant of Certiorari in this Case.

Despite petitioners' entreaties, there is nothing about this case that warrants this Court's intervention once again into the subject of RICO statutes of limitations. During the pendency of this litigation the Court has heard oral argument in no fewer than three cases directly addressing the accrual of civil RICO claims for statute of limitations purposes.[9] In two of those cases, *Grimmett* and *Klehr, amicus curiae* briefs were filed by the *Forbes* petitioners and the NHL Respondents. [10]

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statute of limitations ground and rejecting invocation of fraudulent concealment doctrine because documents in possession of plaintiffs made it clear they had overpaid for their investment); *King & King Enterprises v. Champlin Petroleum Co.*, 446 F. Supp. 906, 912-13 (E.D. Okla. 1978), *aff'd in part, rev'd in part on other grounds*, 657 F.2d 1147 (10th Cir. 1981) (affirming district court ruling that, as a matter of law, fraudulent concealment doctrine did not apply where plaintiffs knew of the facts underlying their claims prior to limitations period).

[9] *Grimmett v. Brown*, Docket No. 95-1723, *cert. dismissed as improvidently granted*, 519 U.S. 233 (1997); *Klehr v. A.O. Smith Corp.*, Docket No. 96-663; *Rotella v. Wood*, Docket No. 98-896.

[10] In *Grimmett v. Brown*: Brief *Amicus Curiae* of Plaintiffs' Executive Committee, MDL No. 1069 and David S. Forbes, filed August 15, 1996, 1996

Each time it has had the opportunity to do so, in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) and *Rotella v. Wood*, 528 U.S. 549 (2000), this Court has tightened the rules governing the filing of civil RICO suits, making it more difficult for civil RICO plaintiffs to survive a statute of limitations defense. And each time this Court has done so, the Third Circuit – consistent with its history of relative permissiveness in this arena – has selected the most pro-plaintiff of the remaining accrual standards, thereby giving petitioners every benefit of the doubt throughout this litigation.

A careful reading of the Third Circuit's opinion shows that it applied the very standard petitioners contend it should have adopted, and thus the opinion is wholly consistent with those in other circuits. Petitioners' principal quarrel is plainly with the Third Circuit's interpretation and understanding of the factual record, not with any significant questions of law. That is not a sufficient reason for this Court to grant a writ of *certiorari*.

WL 470926; Brief of National Hockey League as *Amicus Curiae*, filed October 15, 1996, 1996 WL 595844; in *Klehr v. A.O. Smith & Co.*: Brief *Amicus Curiae* of Plaintiffs' Executive Committee, MDL No. 1069 and David S. Forbes, filed March 24, 1997, 1997 WL 106535; Brief of National Hockey League as *Amicus Curiae*, filed March 20, 1997, 1997 WL 126126.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Dated: May 24, 2001

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In The

Supreme Court of the United States

David S. Forbes, *et al.*,

Petitioners,

v.

R. Alan Eagleson, *et al.*,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Third Circuit

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INTRODUCTION

Based on a less than forthright depiction of the record and opinions below, defendants strive to establish that the Third Circuit adhered to this Court's directives in *Rotella v. Wood*, 528 U.S. 549 (2000), and followed the same summary judgment rule articulated in the other circuits. Defendants also claim that the Third Circuit's decision is entirely fact-bound and that plaintiffs seek only to contest the lower court's weighing of the evidence.

Defendants are wrong in each respect. The Third Circuit charts a course far removed from the plain meaning of this Court's *Rotella* opinion by ruling, in effect, that *Rotella*'s provision for tolling when a "pattern remains obscure" does not apply even when the pattern's existence is merely suspected but cannot be substantiated because of defendants' fraudulent concealment. In so doing, the Third Circuit adopts an approach to the fraudulent concealment doctrine at summary judgment which diverges sharply from the summary judgment rules articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and applied by the Eleventh Circuit in *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *cert. denied*, 529 U.S. 1130 (2000), and by the Fifth, Seventh, and District of Columbia Circuits in the cases cited in plaintiffs' petition.

In our response to defendants' attempt to redefine what happened below, we first briefly restate the evidence in the record. We then show why the Third Circuit's decision incorrectly applied *Rotella* and demonstrate that the Third Circuit's approach differs dramatically from other circuits'.

THE SUMMARY JUDGMENT RECORD CONTAINS ONLY SUSPICIONS OF WRONGDOING

Regardless of the conclusory statements in defendants' brief, there is no argument about the record on which the court held that summary judgment was warranted. Defendants' submissions consisted of two news article sources of information---the *Sports Illustrated* article and the *Eagle-Tribune* articles---as well as the Garvey report and Alberta labour board petition.

With respect to the press reports based on unverifiable hearsay and anonymous sources, no court has ever held that this type of information---standing alone---is sufficient to start the statute of limitations running in the face of a defendant's fraudulent concealment. A plaintiff's attorney cannot file a lawsuit on the basis of such flimsy information without substantiating the facts through an independent investigation. See Fed. R. Civ. P. 11.

We are left, then, with the Garvey report and the Alberta labour filing as the only remaining bases to support summary judgment. But it is undisputed that the facts alleged in the Alberta petition, by its own statement, were founded exclusively on the *Sports Illustrated* article, without any further substantiation. Whatever merit there was to the filing of that petition, that a Canadian sports agent felt comfortable in basing it entirely on unverified reports in a sports magazine could not possibly establish, as a matter of law, that United States lawyers could, consistent with the law, parrot such allegations in a RICO complaint in the district court. To file such a case would require

substantiation of the sports agent's petition through an independent investigation.

It is also undisputed that that independent investigation---the Garvey report---concluded, as it states, that no information could be obtained to determine whether there was any substance to the *Sports Illustrated* innuendo that Eagleson may have somehow pocketed funds as a result of the team owners' largesse. Further, Garvey's uncontroverted affidavits elaborate on his lack of any basis, as a result of his investigation, to allege, in good faith, that Eagleson had been taking bribes---the very RICO predicate acts asserted here.[1]

In fact, Eagleson and the owners actively lied to the players and otherwise deceived them in order to hide their crimes. For this reason, Eagleson's indictment included mail fraud charges for keeping his illegal activity secret from the

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[1] One of defendants' most serious misrepresentations of the evidence in their brief is their assertion that the Garvey report "expanded on the allegations first made public in the *Sports Illustrated* article" and that the "*essence* of the Garvey Report was that Eagleson's loyalty had in effect been purchased by the NHL in exchange for Eagleson's right to divert revenues from international hockey tournaments to his own personal benefit" (emphasis added) (Def. Br., p. 5). The Garvey report emphatically stated the contrary: that Garvey's efforts to ascertain whether Eagleson had pocketed international hockey revenues had completely failed. In Garvey's words, his investigation produced only a "big goose egg."

players. Plaintiffs' offer of proof from the FBI showed that the information about Eagleson's profiteering from international hockey was unobtainable without the power of compulsory process available to the federal government and the use of the government's vast investigatory resources.

This then is the record on which the Third Circuit's ruling must be judged as to whether it followed the same summary judgment approach as the other circuits and correctly applied this Court's teachings in *Rotella*. Even though, as defendants contend (Def. Br., pp. 12-13), the court of appeals did not expressly "say" that a defendant can obtain summary judgment on the mere showing that a plaintiff was suspicious of wrongdoing, there can be no doubt that the Third Circuit, in fact, affirmed summary judgment on just such a showing, since it is uncontested that the summary judgment record establishes no more than the plaintiffs' suspicion of bribe taking based on news articles.[2]

A careful reading of both lower court opinions establishes why this is so. The Third Circuit relied extensively on the district court's discussion of the record evidence. In its most important part, the Third Circuit quoted from the district court's statement that:

> examination of either the *Sports Illustrated* or *The Eagle-Tribune* article[s] would have

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[2] Indeed, with respect to the core issue of the existence of the predicate acts of bribery, the Third Circuit described Garvey only as having "suspected" this activity, 15a.

> revealed almost every detail of the schemes plaintiffs now allege in their complaint . . .

10a. In other words, both lower courts recognized that the only source of whatever information plaintiffs had about the "schemes plaintiffs now allege" (i.e., the elaborate bribery scheme using the international tournaments) was the press reports.

On this record, as defendants note in their brief, the Third Circuit held, under *Rotella*, that "there was nothing obscure about the actionable conduct [i.e., the pattern] here" and that the "unmistakable historical facts demonstrate that the plaintiffs were aware or should have been aware of the facts supporting their . . . claim." (Def. Br., p. 9).

Thus, it is beside the point to assert, as defendants do, that the Third Circuit did not actually recite that a defendant could obtain summary judgment on the mere showing that press reports may have aroused suspicion of RICO predicate acts. (Def. Br., pp. 12-13). That is precisely what the Third Circuit ruled because the "unmistakable historical facts" consisted solely of information in the news articles and Garvey's failed efforts to verify those reports. Since there is no dispute about these facts comprising the entire summary judgment record, the Third Circuit's decision is not fact bound and this Court is not prevented from reaching the important question of the Third Circuit's divergent approach to summary judgment.

THE THIRD CIRCUIT IGNORED *ROTELLA*'S TOLLING REQUIREMENT

Since the only information plaintiffs had that the owners were bribing Eagleson came from unverifiable news articles, the Third Circuit's holding that "there was nothing obscure about the actionable conduct here," 33a, renders a nullity this Court's directive in *Rotella* that the statute of limitations may be tolled "where a pattern [of racketeering activity] remains obscure in the face of a plaintiff's diligence in seeking to identify it." 528 U.S. at 561. The inevitable effect of the Third Circuit's approach, if permitted to stand, is that the statute will not be tolled if there is any hint of illegal activity even where the source of the information is so unreliable as to prevent plaintiffs from pleading it in a complaint.

This Court could not have intended *Rotella* to be interpreted in this manner. *Rotella* clearly anticipated that a plaintiff would have his suspicion aroused by some disclosure of the existence of the RICO predicate acts and for that reason would be required to engage in "diligence in seeking to identify" the pattern. But *Rotella* also anticipated that the pattern might yet "remain obscure."[3] In other words, the plaintiff has some information that a pattern exists but not enough to plead it, even after conducting a diligent investigation. If the facts in the summary judgment record here are insufficient to invoke this

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[3] This Court's reference in *Rotella* to an "obscure pattern" must have been intended to use "obscure" in its ordinary meaning of "unclear" or "ambiguous" or "shadowy" or "blurred."

Court's concept of "a pattern remaining obscure," then there is virtually no fact situation where *Rotella* will have any application.

By contrast, the Third Circuit effectively interpreted "obscure" to mean only illegal activity about which the plaintiff has no facts and no reason to inquire---not even the kind of preliminary information (referred to by most circuits as "inquiry notice") that requires the plaintiff to investigate. Given the unquestionably limited nature of the defendants' summary judgment showing, the Third Circuit's ruling can mean nothing else.

Defendants contend that because this Court has recently made "it more difficult for civil RICO plaintiffs to survive a statute of limitations defense" (Def. Br., p. 19), there is no public policy reason to overturn the Third Circuit's decision. But in broadening the application of the RICO statute of limitations, there is no indication that this Court intended to bar a plaintiff's claim when a defendant's fraudulent concealment prevented plaintiff from obtaining enough information to plead that claim. On the contrary, this Court made it clear that the established rules providing for equitable tolling continue to apply to RICO cases so that in the appropriate case, a fraudulently concealing defendant will not benefit from his own illegal behavior.

In holding that despite defendants' fraudulent concealment here, mere reports in a sports magazine were sufficient to render the owners' complex bribery scheme not obscure, the Third Circuit ignored the plain directive in *Rotella* and set the stage for future applications of this approach in RICO cases that will effectively obliterate the application of the equitable tolling

doctrine. Plaintiffs' claims will be extinguished by the statute of limitations even though their independent investigation fails to uncover enough information to enable them to plead their cause of action. This Court's recent decisions in *Rotella* and in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), could not have intended such a result.

CONFLICT WITH OTHER CIRCUITS

Only by adopting a summary judgment standard directly at odds with the approach of other circuits in the fraudulent concealment context could the Third Circuit have reached its erroneous interpretation of *Rotella*.

Defendants, however, claim there is no difference between the summary judgment standard used by the Third Circuit and that used by the Eleventh Circuit in *Morton's Market*. But defendants' contention is founded on a misleading use of quotations from the Third Circuit's opinion. First, defendants say that the Third Circuit "carefully articulated the paradigm it intended to use for analysis of the" summary judgment motion in this case and then quote from the opinion as representing this so-called paradigm (Def. Br., pp. 10-11). The part quoted is the Third Circuit's statement that the court must determine "whether there is sufficient evidence to support a finding that plaintiffs were not aware, nor should they have been aware, of the facts supporting their claim . . ." (Def. Br., p. 11).

But what defendants redacted is the first line of the paragraph which contains the above quote. In establishing its paradigm for deciding the summary judgment motion, the Third Circuit began the paragraph by stating "that the plaintiff has the burden of proving fraudulent concealment," 31a, and never stated that it was imposing any summary judgment responsibility or burden on defendants as required by *Celotex*.

In a disingenuous attempt to convince this Court that there is no conflict between the Third Circuit and the other circuits, defendants contend that the Third Circuit's paradigm, as selectively quoted by them, "is remarkably similar to that" followed by the Eleventh Circuit in *Morton's Market* (Def. Br., p. 14). Defendants' assertion is wholly inaccurate. As plaintiffs demonstrated in their petition, the Eleventh Circuit stated explicitly that "the Dairies have the burden, as the moving parties, to point to undisputed facts in the record which demonstrate conclusively that plaintiffs had notice of their claims . . ." 198 F.3d at 832.

There is no comparable establishment of the defendants' burden by the Third Circuit here. On the contrary, the court stated the inverse of the Eleventh Circuit's rule: that plaintiffs have the burden of proving the fraudulent concealment doctrine and that one of the elements they were required to prove was that they did not have notice of their claims. In other words, instead of requiring defendants to prove, on summary judgment, a positive, i.e., that plaintiffs had notice, the Third Circuit required the plaintiffs to prove a negative: that they did not have notice.

Indeed, had the Third Circuit followed the rule in *Morton's Market* (a rule vigorously urged on it by plaintiffs in their briefs), it would have not required any showing by plaintiffs after defendants supported their summary judgment motion with mere unsubstantiated disclosures in news articles. On the virtually identical showing in *Morton's Market*, the Eleventh Circuit held that defendants had "succeeded in demonstrating only that there is a jury question regarding the tolling of the statute of limitations by fraudulent concealment." 198 F.3d at 833. Like defendants here, the *Morton's Market* defendants showed only that the news reports "*might* have led plaintiffs to inquire, and have made virtually no showing at all regarding

what plaintiffs would have discovered had they done so." *Id.* (emphasis in original).[4]

The other circuits cited by plaintiffs also plainly place the summary judgment burden on defendants to demonstrate, by uncontested facts, that the plaintiffs not only were suspicious and therefore had reason to investigate, but that the investigation would have turned up facts "sufficiently advanced beyond the stage of a mere suspicion, sufficiently confirmed or substantiated." *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997).

Thus, defendants mislead the Court by urging, through selective quotation, that the Third Circuit's formulation and application of the summary judgment rules are no different from the Eleventh and other circuits. In fact, the Third Circuit's approach of effectively relieving defendants of their summary judgment burden in this type of case breaks new ground and puts it on a collision course both with the other circuits, and with this Court's pronouncements in *Rotella* and *Celotex*, among others.

CONCLUSION

For the reasons stated above and in their petition, plaintiffs urge this Court to grant their petition for a writ of *certiorari*.

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[4] Of course, here, even though they believe that defendants' summary judgment motion did not require it, plaintiffs made an elaborate showing of their diligent investigation and of the impossibility of discovering the needed facts without compulsory process and far greater resources.

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